(18,472.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 619.

J. W. ALLEN, COMPTROLLER OF THE STATE OF TENNESSEE, PLAINTIFF IN ERROR,

vs.

PULLMAN'S PALACE CAR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the middle district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, in a suit between Pullman's Palace Car Company, plaintiff, and J. W. ——, comptroller of the State of Tennessee, being three cases consolidated upon hearing, viz., Nos. 2866, 2867, and 2903, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of
b such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said J. W. Allen, comptroller, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of March, in the year of our Lord one thousand nine hundred and two.

H. M. DOAK,
Clerk of the Circuit Court of the United States
for the Middle District of Tennessee.

[Seal Circuit Court U. S., Middle District Tenn.]

Allowed by—

HORACE H. LURTON,
Judge of the Circuit Court of the United States
for the Middle District of Tennessee.

1 At a regular term of the circuit court of the United States begun and holden for the middle district of Tennessee, in the sixth judicial circuit, at Nashville, in said district, upon the third Monday of October, 1901, present and presiding the Hon. Chas. D. Clark, judge, etc., the following among other proceedings were had, to wit:

The following causes came on for hearing before the Hon. C. D. Clark, judge, etc., during said term, upon the supplied pleadings, stipulation waiving jury, order of consolidation of said causes for hearing, proof and argument of counsel, viz:

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867. Law.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866. Law.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903. Law.

The following bill of exceptions was signed, sealed and filed, viz:

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866.

and

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903.

On the trial of these causes the following stipulations and evidence and agreements were given in evidence, viz:

In the Circuit Court of the United States for the Middle District of Tennessee.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller. } No. 2866. Law.

Stipulation.

The declaration and pleas in the above-entitled cause have been lost and it is hereby stipulated that the attached papers are true

copies of said declaration and pleas and may be used with
2 like effect as the originals.

JNO. S. RUNNELLS,
WM. BURRY,
WM. L. GRANBERY,
Attorneys for Plaintiff.
VERTREES & VERTREES,
Attorneys for Defendant.

UNITED STATES OF AMERICA, } *ss:*
Middle District of Tennessee, }

In the Circuit Court of the United States for the Middle District of Tennessee, October Term, 1891.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the Treasury of the State of Tennessee. } No. 2866. Law.

Pullman's Palace Car Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois, sues J. W. Allen, comptroller of the treasury of the State of Tennessee, a citizen of the State of Tennessee, and a resident of the middle district of Tennessee, for $20,000.00, as damages and for cause of action says:

That the domicile, place of business and principal office of Pullman's Palace Car Company, plaintiff herein, is in the city of Chicago, in the county of Cook and State of Illinois, where it is engaged in manufacturing sleeping and parlor cars, and by contracts with railroad companies throughout the United States of America, Canada and Mexico, furnishing such cars for use in operating long, continuous, connecting lines of railroad, extending interstate, and between foreign nations; that it retains the possession of such cars and receives certain compensation from railroad passengers who may desire to use the seats and sleeping berths in said cars; and in manufacturing all other kinds of railroad cars and street cars and in doing various other kinds of manufacturing business.

That it is a corporation foreign to the State of Tennessee and is not a citizen of that State; that it is engaged exclusively in the business of interstate commerce in the State of Tennessee and in no other business whatever in that State; that all of its sleeping and parlor cars running into, or into and through the State of Tennessee, are vehicles of interstate commerce; that it has never sent any of
such cars into the State of Tennessee for the purpose of con-
3 ducting or carrying on any business local to that State, or for permanent use therein; that all of such cars running into, or into and through the State of Tennessee, have been heretofore and are now run into, or into and through that State under that comity between the States which is guaranteed by the Constitution of the United States, conferring upon Congress the power * * * "to

regulate commerce with foreign nations and between the several States."

That heretofore and prior to the first day of January, 1887, plaintiff entered into certain separate contracts with certain railroad companies, owning long, continuous, connecting lines of railroad extending from other States and Territories of the United States into and through the State of Tennessee, each of said lines of railroad also connecting with other railroad lines running through many of the States and Territories of the United States and into foreign countries; that in and by the terms of such contracts, plaintiff agreed with said railroad companies to furnish sleeping and parlor cars for use in operating their respective lines of railroad, sufficient in number to meet the requirements of travel upon and over the lines of said railroads, and to furnish with each of said cars one or more employés, whose duty it shall be to collect fares for the extra accommodations furnished therein, and generally to provide for the comfort of passengers in said cars, all of which contracts or continuations thereof are still in force.

That in and by each of said contracts the said railroad companies agreed to haul such sleeping and parlor cars on their respective lines of road, and at their own expense to furnish fuel for said cars, to light, wash and clean the same, and to permit the plaintiff herein to collect its usual charges from the railroad companies' passengers, who might desire to use the extra accommodations provided by the plaintiff to place its tickets in the hands of said railroad companies' ticket agents, at their railroad ticket offices, for sale to such railroad passengers as shall desire to use the extra accommodations provided, as aforesaid, without charge to the plaintiff, the proceeds of such sales, however, to be at the risk of and to enure wholly to the use and benefit of the plaintiff herein; and the plaintiff reserved the right to retain the possession and control and management of the inside of said sleeping and parlor cars and to sell to such railroad passengers as should desire it, the use of seats and sleeping berths in said cars and to collect fares for the extra accommodation furnished in said cars. All of which things, together with other provisions of said contracts not material to this cause will fully appear by reference to said original contracts now in the possession of the plaintiff and ready to be produced as this court shall direct; and it attaches to this declaration as Exhibit "A" a copy of one of such contracts and avers that all the other of said contracts are in substance similar thereto.

4

That its capital stock represents all of its real, personal, tangible and intangible property, including all of its sleeping and parlor cars and including all of the sleeping and parlor cars used upon the lines of railroads in the State of Tennessee.

That by section 5 of the general revenue acts of the State of Tennessee for the year 1889, approved April 8th, 1889, it is provided:

"The following corporations shall pay directly to the comptroller's office the following taxes: * * *

Sleeping car companies.

(In lieu of all other taxes except ad valorem tax.)

Each company doing business in this State, for one or more passengers taken up at one point in this State and delivered at another point in this State and transported wholly within this State, per annum, $3,000.00."

That the said section 5 of the general revenue acts of the State of Tennessee, approved April 8th, 1889, for raising revenue for the years 1889 and 1890 is illegal, unconstitutional and void, because it discriminates in favor of railroad companies, in that it imposes a tax upon the property and business of sleeping car companies only and exempts from such tax railroad companies using and operating their own sleeping cars within the State and that it is in violation of section 28, article II of the constitution of the State of Tennessee, which provides that: "All property shall be taxed according to its value * * * so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value," and that it is violation of the provisions of the Constitution of the United States, being a tax upon the vehicles engaged in, and the business of, interstate commerce.

That it never had any domicile or principal place of business in the State of Tennessee; that it owns in whole or in part, manages and operates more than 2,200 sleeping and parlor cars running into every State and Territory in the United States and into Canada and Mexico; that its only domicile and principal place of business for conducting the operation of all such cars is in the city of Chicago, in the county of Cook and State of Illinois as aforesaid; its principal officers reside there; its moneys earned all over the United States, Canada and Mexico are remitted there as soon as possible in the course of business; that no special cars belonging to it are, at all times, used in the State of Tennessee; but its sleeping and parlor cars are constantly changing from road to road to meet the demands and emergencies of business and traffic, and sleeping and parlor cars at one time running in the State of Tennessee, are at other times transferred to railroads in other States and Territories of the United States and foreign countries, and other sleeping and parlor cars belonging to it are run in their places.

That none of its sleeping and parlor cars are or ever have been taken into the State of Tennessee for the purpose of doing any business *lo* local to that State, or for permanent or continuous use therein, but solely in pursuance of the business of interstate commerce, in which it is engaged, as heretofore stated, and, therefore, such cars have no taxable situs in the State of Tennessee; that plaintiff is each year assessed and taxed at its domicile and principal place of business in said county of Cook and State of Illinois upon its tangible property and upon its capital stock, and that it has been so assessed and taxed for the years 1889 and 1890 in the county and State aforesaid, upon its tangible property and upon its capital

stock; that it is engaged solely and exclusively in the business of interstate commerce in the State of Tennessee and in no other business whatever, and is, therefore, under the protection of the Constitution of the United States, conferring upon Congress the power * * * "to regulate commerce with foreign nations and among the several States," and that the State of Tennessee has no power or authority to impose any tax or license upon said cars or prohibit the plaintiff from running said cars into and through the State of Tennessee in the prosecution of its said business of interstate commerce.

That the defendant, J. W. Allen, comptroller of the treasury of the State of Tennessee, acting under said section 5 of the general revenue acts of the State of Tennessee, approved April 8, 1889, did, in his official capacity as said comptroller, on the 28th day of August, A. D., 1891, issue his warrant, and place, or cause the same to be placed in the hands of W. J. Hill, sheriff of Davidson county, Tennessee, reciting that Pullman's Palace Car Company, plaintiff herein, was liable under section 5 of the general revenue acts of 1889, for certain taxes, to wit, the sum of $3,000.00 per year for each of the years from April 8, 1889, to April 8, 1892, being
6 three years, and making a total of $9,000.00 of principal with $745.50 interest thereon, making an aggregate of $9,745.50 and commanding said sheriff to distrain of the goods, chattels and property of this plaintiff sufficient in amount and value to make, by the sale thereof, the said sum of $9,745.50, with all necessary costs, charges, etc., and after due advertising, to sell the same, etc., and that, acting under said warrant and command, the said sheriff did distrain and levy upon the sleeping car "Bartholdi," property of the plaintiff herein, which was then temporarily lying at the union depot in the city of Nashville, in the State of Tennessee, said car having arrived in Nashville on the morning of the said 28th day of August, A. D. 1891, from the city of Atlanta, in the State of Georgia, and was due to leave Nashville the same evening for Memphis, in the State of Tennessee, said car being engaged in the business of interstate commerce. And thereupon Pullman's Palace Car Company, plaintiff herein, protesting that the said law, embraced in said section 5 of the general revenue acts of the State of Tennessee, approved April 8, 1889, was null and void and in violation of the constitution of the State of Tennessee and of the Constitution of the United States, because plaintiff was engaged in the business of interstate commerce and in no other business within the State of Tennessee and the said tax was a tax levied by the State of Tennessee upon the plaintiff's cars used in the business of interstate commerce and for the privilege of conducting and carrying on its business of interstate commerce within the State of Tennessee and that plaintiff entered the State only for the purpose of carrying on its business of interstate commerce; that its sleeping and parlor cars running into, or into and through and out of the State of Tennessee, in the conduct of its said business of interstate commerce, had no domicile within the State of Tennessee; were not taken into Tennessee for the purpose of carrying on any business local to that State; that all of its said

cars were engaged exclusively in the business of interstate commerce and did not have any situs within the State of Tennessee and that neither the plaintiff nor any of its cars were subject to the jurisdiction of the State of Tennessee for the purpose of assessment and taxation, under compulsion of said warrant in the hands of said sheriff and in order to prevent the sale of said "Bartholdi," the interruption of its interstate-commerce business and a violation of its said contract with the railroad company "to furnish cars, etc," was
7 forced to pay to the said comptroller the said sum of $9,745.50, the said taxes so illegally demanded and exacted from it and the plaintiff, on the same date, last aforesaid, did pay said taxes, under protest, within the meaning and intent of the statute of the State of Tennessee and is entitled to recover the same from the said comptroller.

Wherefore plaintiff sues for twenty thousand dollars as damages.

JOHN S. RUNNULLS,
WM. BURRY,
WM. L. GRANBERY,
Attorneys for Plaintiff.

Summons issued Sept. 26, 1891.
Declaration filed Oct. 12, 1891.

UNITED STATES OF AMERICA,
Middle District of Tennessee.

In the Circuit Court of the United States for the Middle District of Tennessee, October Term, 1891.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866. Law.

The defendant comes by attorney and for plea says: he does not owe the plaintiff the sum averred in plaintiff's declaration, or any part thereof, on account of taxes illegally exacted and collected of the plaintiff, and of this he puts himself upon the country.

And defendant gives notice that under this plea he will rely upon the following denials and defenses, to wit:

First.

He denies that he owes any part of the sum sued for.

Second.

He admits that the Tennessee statutes did, during the years, 1889, 1890, 1891, and 1892, impose upon sleeping car companies doing business in the State, a license tax of $3,000.00 per annum.

He denies that said statute violates any constitutional provision State or Federal. He denies that the statute imposes or was intended to impose any tax upon the interstate business of such companies, but wholly and alone upon their local and internal business.

He denies that plaintiff did, during said years, do exclusively interstate business within this State and avers that, on the contrary, it did a large local business thereby rendering itself liable for said tax.

He denies that plaintiff had no office in Tennessee, if that fact be material.

8 He denies that all of plaintiff's cars are interstate, but avers that many of its cars run locally within the State and many others, *tho* though running interstate, engage in local internal business.

He denies the alleged contracts between plaintiff and the various railway companies.

He denies that plaintiff pays taxes upon its property used in Tennessee, in any other States, if that be material.

He avers that plaintiff has endeavored to evade the tax laws of this State by the method of running its cars and by intermingling its internal and interstate business, pretending to do interstate, while in facts engaged in internal business.

G. W. PICKLE,
Attorney General for the State of Tennessee.

Plea filed October 23d, 1893.

9 In the Circuit Court of the United States for the Middle District of Tennessee, October Term, 1891.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller, etc. } No. 2867. Law.

Stipulation.

The declaration and pleas in the above-entitled cause have been lost and it is hereby stipulated that the attached papers are true copies of said declaration and pleas and may be used with like effect as the originals.

JNO. S. RUNNELLS,
WM. BURRY,
WM. L. GRANBERY,
Attorneys for Plaintiff.
VERTREES & VERTREES,
Attorneys for Defendant.

UNITED STATES OF AMERICA, *Middle District of Tennessee*, } ss:

In the Circuit Court of the United States for the Middle District of Tennessee, October Term, 1891.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the Treasury of the State of Tennessee. } Law. No. 2867.

Pullman's Palace Car Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois, sues J. W. Allen, comptroller of the treasury of the State of Tennessee, a citizen of the State of Tennessee, and a resident of the middle district of Tennessee for $10,000.00 as damages, and for cause of action says:

That the domicile, place of business and principal office of Pullman's Palace Car Company, plaintiff herein, is in the city of Chicago, in the county of Cook and State of Illinois, where it is engaged in manufacturing sleeping and parlor cars and by contracts with railroad companies throughout the United States of America, Canada and Mexico, furnishing such cars for use in operating long, continuous, connecting lines of railroad extending interstate and between foreign nations, that it retains the possession of such cars and receives certain compensation from railroad passengers who may desire to use the seats and sleeping berths in said cars; and in manufacturing all other kinds of railroad cars and street cars and in doing various other kinds of manufacturing business.

That it is a corporation foreign to the State of Tennessee and is not a citizen of the State; that it is engaged exclusively in the business of interstate commerce in the State of Tennessee and in no other business whatever in that State; that all of its sleeping and parlor cars running into, or into and through the State of Tennessee are vehicles of interstate commerce; that it has never sent any of
10 such cars into the State of Tennessee for the purpose of conducting or carrying on any business local to that State, or for permanent use therein; that all of said cars running into, or into and through the State of Tennessee, have been heretofore and are now, run into, or into and through that State under that comity between the States which is guaranteed by the Constitution of the United States, conferring upon Congress the power "to regulate commerce with foreign nations and among the several States."

Thate heretofore and prior to January, 1887, plaintiff entered into certain separate contracts with certain railroad companies, owning long, continuous, connecting lines of railroad extending from other States and Territories of the United States into, or into and through the State of Tennessee, each of said lines of railroad also connecting with other railroad lines running through many of the States and Territories of the United States and into foreign countries; that in and by the terms of such contracts, plaintiff agreed with said rail-

road companies to furnish sleeping and parlor cars for use in operating their respective lines of railroad, sufficient in number to meet the requirements of travel upon and over the lines of said railroads and to furnish with each of said cars one or more employees, whose duty it shall be to collect fares for the extra accommodations furnished therein and generally to provide for the comfort of passengers in said cars, all of which contracts or continuations thereof are still in force.

That, in and by each of said contracts the said railroad companies agreed to haul such sleeping and parlor cars on their respective lines of road, and, at their own expense to furnish fuel for said cars, to light, wash, and clean the same, and to permit the plaintiff herein to collect its usual charges from the railroad companies' passengers, who might desire to use the extra accommodations provided by the plaintiff in such sleeping and parlor cars; and to permit the plaintiff to place its tickets in the hands of the said railroad companies' ticket agents, at their railroad ticket office, for sale to such railroad passengers as shall desire to use the extra accommodations provided, as aforesaid, with charge to the plaintiff, the proceeds of such sales however, to be at the risk of and enure wholly to the use and benefit of the plaintiff herein; and the plaintiff reserved the right to retain the possession and control and management of the inside of said sleeping and parlor cars and to sell to such railroad passengers as should desire it the use of *of* seats and sleeping berths in said
11 cars and to collect fares for the extra accommodations furnished in said cars. All of which things, together with other provisions of said contracts not material to this cause, will fully appear by reference to said original contracts now in the possession of the plaintiff and ready to be produced as this court shall direct; and it attaches to this declaration, as Exhibit "A," a copy of one of such contracts and avers that all the other of said contracts are in substance similar thereto.

That its capital stock represents all of its real, personal, tangible and intangible property, including all of its sleeping and parlor cars and including all of the sleeping and parlor cars used upon the lines of railroad in the State of Tennessee.

That, by section 5 of the general revenue acts of the State of Tennessee for the year 1887, approved March 29th, 1887, it is provided that: "Sleeping car companies.—Each company doing business in the State, on each car per annum, $500."

That the said section 5 of the general revenue acts of the State of Tennessee approved March 29th 1887, for raising revenue for the years 1887 and 1888 — is illegal, unconstitutional and void, because it discriminates in favor of railroad companies, in that it imposes a tax upon the property and business of sleeping car companies only, and exempts from such tax railroad companies using and operating their own sleeping cars within the State and that it is in violation of section 28 of article 2 of the constitution of the State of Tennessee, which provides that: "All property shall be taxed according to its value, * * * so that taxes shall be equal and uniform throughout the State. No one species of property from which

a tax may be collected shall be taxed higher than any other species of property of the same value," and that it is in violation of the provisions of the Constitution of the United States, being a tax upon vehicles engaged in and the business of interstate commerce.

That it never had any domicile or principal place of business
12 in the State of Tennessee; that it owns in whole or in part, manages and operates more than 2200 sleeping and parlor cars, running into every State and Territory of the United States and into Canada and Mexico; that its only domicile and principal place of business for conducting the operation of all such cars is in the city of Chicago, in the county of Cook and State of Illinois as aforesaid; its principal officers reside there; its records are there; its moneys earned all over the United States, Canada and Mexico are remitted there as soon as possible in the course of business; that no special cars belonging to it are, at all times, used in the State of Tennessee; but its sleeping and parlor cars are constantly changing from road to road to meet the demands and emergencies of business and traffic and sleeping and parlor cars at one time running in the State of Tennessee are at other times transferred to railroads in other States and Territories of the United States and foreign countries and other sleeping cars and parlor cars belonging to it are run in their places.

That none of its sleeping and parlor cars are or ever have been taken into the State of Tennessee for the purpose of doing any business local to that State, or for permanent or continuous use therein, but solely in pursuance of the business of interstate commerce, in which it is engaged as hereinbefore stated, and therefore, such cars have no taxable situs in the State of Tennessee; that plaintiff is each year assessed and taxed at its domicile and principal place of business in the said county of Cook and State of Illinois upon its tangible property and upon its capital stock, and that it has been so assessed and taxed for *for* the year- 1892, 1887, and 1888, in the county and State aforesaid upon its tangible property, and upon its capital stock; that it is engaged solely and exclusively in the business of interstate commerce in the State of Tennessee, and in no other business whatever, and is, therefore, under the protection of the Constitution of the United States conferring upon Congress the power "to regulate commerce with foreign nations and among the several States," and that the State of Tennessee has no power or authority to impose any tax or license upon said cars or prohibit the plaintiff from running said cars into, or into and through the State of Tennessee in the prosecution of its said business of interstate commerce.

13 That the sum of $500.00 per car is an unjust, oppressive and ex*h*orbitant tax, even if the State had the legal right to impose any tax. That heretofore the State of Tennessee imposed a tax of $50.00 per car, to be levied on each car running into, or into and through the State of Tennessee, and that when the courts of the United States held that the State of Tennessee could not tax or license cars engaged in interstate commerce, the officers and the legislature of that State, believing that two of plaintiff's cars, which were

at one time operated locally within the State of Tennessee, in connection with and as a part of its general business of interstate commerce, could be taxed or licensed by the State, increased the rate of taxation from $50.00 per car to $500.00 per car, intending thereby to derive from said two cars an amount of tax equal to what the State would have realized on all cars running into or through the State at the rate of $50.00 per car and by this means to evade and defeat the effect of the decisions of the courts of the United States.

That the defendant, J. W. Allen, comptroller of the treasury of the State of Tennessee, acting under said section 5 of the general revenue acts of the State of Tennessee, approved March 29th, 1887, did, in his official capacity as said comptroller on the 28th day of August, 1891, issue his warrant and place, or cause the same to be placed in the hands of W. J. Hill, sheriff of Davidson county, Tennessee, reciting that Pullman's Palace Car Company, plaintiff herein, was liable under section 5 of the general revenue acts of 1887, for certain taxes, to wit, for taxes on two cars alleged to have been run locally, in the years 1887, and 1888, within the State of Tennessee, between Nashville and Memphis, $2468.32; for taxes on two cars alleged to have been run locally in the years 1887 and 1888, within the State of Tennessee, between Nashville and Chattanooga, $2468.32, for taxes on one car for the years 1887 and 1888, as the proportion due *the* to the State of Tennessee on all cars running through that State and cars running from other States into the State of Tennessee, or from within the State of Tennessee out of it and into other States $1234.16, making a total of 6170.80, and commanding said sheriff to distrain of the goods, chattels and property of this plaintiff sufficient in amount and value to make, by the sale thereof, the said sum of $6170.80, with all necessary charges, costs, *charges*, etc. and, after due advertisement, to sell the same, etc., and that acting under said warrant and command of said sherif- did distrain and levy upon the sleeping car "Bartholdi," the property of the plaintiff herein which

14 *which* was then temporarily lying at the union depot in the city of Nashville, in the State of Tennessee, said car having arrived in Nashville on the morning of said 28th day of August, A. D. 1891, from the city of Atlanta, in the State of Georgia, and was due to leave Nashville the same evening for Memphis in the State of Tennessee, said car being engaged in the business of interstate commerce, and thereupon Pullman's Palace Car Company, plaintiff herein, protesting that the said law, embraced in said section 5 of the general revenue acts of the State of Tennessee, approved March 29th, 1897, was null and void and in violation of the constitution of the State of Tennessee and of the Constitution of the United States, because the plaintiff was engaged in the business of interstate commerce, and in no other business within the State of Tennessee, and the said tax was a tax levied by the State of Tennessee upon the plaintiff's cars used in the business of interstate commerce, and for the privielege of conducting and carrying on its business of interstate commerce within the State of Tennessee, and that plaintiff entered the State only for the purpose of carrying on its business of interstate commerce; that its sleeping and parlor cars running into, or into,

through and out of the State of Tennessee, in the conduct of its said business of interstate commerce, had no domicile within the State of Tennessee; were not taken into Tennessee for the purpose of carrying on any business local to that State; that all of its said cars were engaged exclusively in the business of interstate commerce, and did not have any situs within the State of Tennessee and that neither the plaintiff nor any of its cars were subject to the jurisdiction of the State of Tennessee for the purpose of assessment and taxation, under compulsion of said warrant in the hands of said sheriff, and in order to prevent the sale of said car, "Bartholdi," the interruption of its interstate-commerce business and a violation of its contract with the railroad company "to furnish cars, etc.," was forced to pay to the said comptroller the said sum of $6170.80, the said taxes so illegally demanded and exacted from it and the plaintiff, on the date last aforesaid, did pay said taxes under protest, within the meaning and intent of the statute of the State of Tennessee and is entitled to recover the same from the said comptroller.

Wherefore plaintiff sues for $10,000.00 as damages.

JNO. S. RUNNELLS,
WM. BURRY,
WM. L. GRANBERY,
Attorneys for Plaintiff.

Summons issued Sept. 26, 1891.
Declaration filed Oct. 19, 1891.

UNITED STATES OF AMERICA, }
Middle District of Tennessee. }

15 In the Circuit Court of the United States for the Middle District of Tennessee, October Term, 1891.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867. Law.

The defendant comes by his attorney and for plea says that he does not owe the *the* plaintiff the sum of $6170.80, sued for or any part thereof, on account of taxes illegally exacted or collected of the plaintiff as averred in its declaration, or on any other account, and of this he puts himself upon the country.

And the defendant gives notice that he will under this plea rely upon the following denials and defenses, to wit:

First.

He denies that said sum of $6170.80, or any part of it, was paid to defendant in manner and form as averred in the declaration.

Second.

He admits that the laws of the State of Tennessee for the years 1887 and 1888 imposed upon "sleeping car companies" a license tax of $500.00 per annum on each car, but he denies that this stat-

ute is in conflict with either the State or Federal Constitution. He denies that it imposes any tax upon interstate business of such companies and avers that plaintiff's cars were, in and during the years 1887 and 1888, engaged exclusively within the State of Tennessee, in interstate business, but avers, on the contrary, that some of its cars, sleeping and parlor, were employed exclusively in internal business within the State and many other of its cars were employed in both internal and interstate business and *and* that plaintiff is liable for the internal business done by the one or the other class of cars.

He denies that all of plaintiff's cars ran interstate during said years, but avers, on the contrary, that some of them were employed regularly on local roads within the State, and he avers that if they were changed and run interstate at all, that it was done for the fraudulent purpose of defeating the operation of the tax laws of the State and was in fact and reality but fraudulently and colorably done.

He denies that plaintiff has no principal office in Tennessee, if that averment be material.

He denies that plaintiff pays taxes in the State of Illinois upon its cars employed in Tennessee, but insists this fact is not material.

He denies that plaintiff's cars are without any situs in
16 Tennessee but this fact is not material.

He denies that the laws passed for the purpose of taxing sleeping cars companies in Tennessee were intended to evade the Constitution and laws of the United States, but this is not material.

He avers that said laws were passed, as were other like statutes, to raise revenue to meet the State's obligations and to require plaintiff and other like companies to contribute its share of the necessary burdens of taxation.

He denies the alleged contracts between the various railway companies as averred in the declaration.

He denies that the tax imposed is unjust or oppressive, but avers, on the contrary, that many of the local interests of the State are far more heavily burdened by the same laws.

G. W. PICKLE,
Attorney General for State of Tennessee.

Plea filed October 23d, 1893.

17 In the Circuit Court of the United States for the Middle District of Tennessee.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller, etc. } No. 2903. Law.

Stipulation.

The declaration and pleas in the above-entitled cause have been lost and it is hereby stipulated that the attached papers are true

copies of said declaration and pleas and may be used with like effect as the originals.

JNO. S. RUNNELLS,
WM. BURRY,
WM. L. GRANBERY,
Attorneys for Plaintiff.
VERTREES & VERTREES,
Attorneys for Defendant.

UNITED STATES OF AMERICA,
Middle District of Tennessee, } *ss:*

In the Circuit Court of the United States for the Middle District of Tennessee, October Term, 1891.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the Treasury of the State of Tennessee. } Law. No. 2903.

Pullman's Palace Car Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois, sues J. W. Allen, comptroller of the treasury of the State of Tennessee, a citizen of the State of Tennessee, and a resident of the middle district of Tennessee for $10,000.00 as damages, and for cause of action says:

That the domicile, place of business and principal office of Pullman's Palace Car Company, plaintiff herein, is in the city of Chicago, in the county of Cook and State of Illinois, where it is engaged in manufacturing sleeping and parlor cars and by contracts with railroad companies throughout the United States of America, Canada and Mexico, furnishing such cars for use in operating long, continuous, connecting lines of railroad extending interstate and between foreign nations, that it retains the possession of such cars and receives certain compensation from railroad passengers who may desire to use the seats and sleeping berths in said cars; and in manufacturing all other kinds of railroad cars and street cars and in doing various other kinds of manufacturing business.

That it is a corporation foreign to the State of Tennessee and is not a citizen of the State; that it is engaged exclusively in the business of interstate commerce in the State of Tennessee and in no other business whatever in that State; that all of its sleeping and parlor cars running into, or into and through the State of Tennessee are vehicles of interstate commerce; that it has never sent any of such
18 cars into the State of Tennessee for the purpose of conducting or carrying on any business local to that State, or for permanent use therein; that all of said cars running into, or into and through the State of Tennessee, have been heretofore and are now, run into, or into and through that State under that comity between the States which is guaranteed by the Constitution of the United States, conferring upon Congress the power "to regulate commerce with foreign nations and among the several States."

That heretofore and prior to January, 1887, plaintiff entered into certain separate contracts with certain railroad companies, owning long, continuous, connecting lines of railroad extending from other States and Territories of the United States into, or into and through the State of Tennessee, each of said lines of railroad also connecting with other railroad lines running through many of the States and Territories of the United States and into foreign countries; that in and by the terms of such contracts, plaintiff agreed with said railroad companies to furnish sleeping and parlor cars for use in operating their respective lines of railroad, sufficient in number to meet the requirements of travel upon and over the lines of said railroads and to furnish with each of said cars one or more employees, whose duty it shall be to collect fares for the extra accommodations furnished therein and generally to provide for the comfort of passengers in said cars, all of which contracts or continuations thereof are still in force.

That, in and by each of said contracts the said railroad companies agreed to haul such sleeping and parlor cars on their respective lines of road, and, at their own expense to furnish fuel for said cars, to light, wash, and clean the same, and to permit the plaintiff herein to collect its usual charges from the railroad companies' passengers, who might desire to use the extra accommodations provided by the plaintiff in such sleeping and parlor cars; and to permit the plaintiff to place its tickets in the hands of the said railroad companies' ticket agents, at their railroad ticket office, for sale to such railroad passengers as shall desire to use the extra accommodations provided, as aforesaid, with charge to the plaintiff, the proceeds of such sales, however, to be at the risk of and enure wholly to the use and benefit of the plaintiff herein; and the plaintiff reserved the right to retain the possession and control and management of the inside of said

19 cleeping and parlor cars and to sell to such railroad passengers as should desire it the use of *of* seats and sleeping berths in said cars and to collect fares for the extra accommodations furnished in said cars. All of which things, together with other provisions of said contracts not material to this cause, will fully appear by reference to said original contracts now in the possession of the plaintiff and ready to be produced as this court shall direct; and it attaches to this declaration, as Exhibit "A," a copy of one of such contracts and avers that all the other of said contracts are in substance si*l*milar thereto.

That its capital stock represents all of its real, personal, tangible and intangible property, including all of its sleeping and parlor cars and including all of the sleeping and parlor cars used upon the lines of railroad in the State of Tennessee.

That by section 5 of the general revenue acts of the State of Tennessee for the year 1889, approved April 8, 1889, is provided: "The following corporation shall pay directly to the comptroller's office the following taxes: * * *

Sleeping car companies.

(In lieu of all other taxes, except ad valorem tax.)

Each company doing business in this State, for one or more passengers taken up at one point in this State, and delivered at another point in this State and transported wholly within this State, per annum, * * * $3,000.00."

That the said section 5 of the general revenue acts of the State of Tennessee approved April 8, 1889, — , is illegal, unconstitutional and void, because it discriminates in favor of railroad companies, in that it imposes a tax upon the property and business of sleeping car companies only, and exempts from such tax railroad companies using and operating their own sleeping cars within the State and that it is in violation of section 28 of article 2 of the constitution of the State of Tennessee, which provides that: "All property shall be taxed according to its value, * * * so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value," and that it is in violation of the provisions of the Constitution of the United States, being a tax upon vehicles engaged in and the business of interstate commerce.

That it never had any domicile or principal place of business in the State of Tennessee; that it owns in whole or in part, manages and operates more than 2200 sleeping and parlor cars, running into every State and Territory of the United States and into Canada and Mexico; that its only domicile and principal place of business for conducting the operation of all such cars is in the city of Chicago, in the county of Cook and State of Illinois as aforesaid; its principal officers reside there; its records are there; its moneys earned all over the United States, Canada and Mexico are remitted there as soon as possible in the course of business; that no special cars belonging to it are, at all times, used in the State of Tennessee; but its sleeping and parlor cars are constantly changing from road to road to meet the demands and emergencies of business and traffic and sleeping and parlor cars at one time running in the State of Tennessee are at other times transferred to railroads in other States and Territories of the United States and foreign countries and other sleeping cars and parlor cars belonging to it are run in their places.

That none of its sleeping and parlor cars are or ever have been taken into the State of Tennessee for the purpose of doing any business local to that State, or for permanent or continuous use therein, but solely in pursuance of the business of interstate commerce, in which it is engaged as hereinbefore stated and, therefore, such cars have no taxable situs in the State of Tennessee; that plaintiff is each year assessed and taxed at its domicile and principal place of business in the said county of Cook and State of Illinois upon its tangible property and upon its capital stock and that it has been so assessed and taxed for *for* the year 1892, in the county and State afore-

said upon its tangible property and upon its capital stock; that it is engaged solely and exclusively in the business of interstate commerce in the State of Tennessee and in no other business whatever, and is, therefore, under the protection of the Constitution of the United States conferring upon Congress the power "to regulate commerce with foreign nations and among the several States," and that the State of Tennessee has no power or authority to impose any tax or license upon said cars or prohibit the plaintiff from running said cars into, or into and through the State of Tennessee in the prosecution of its ...d business of interstate commerce.

21 That the defendant, J. W. Allen, comptroller of the treasury of the State of Tennessee, acting under said revenue acts of the State of Tennessee, did, in his official capacity, as said comptroller, on the 3d day of May, 1892, issue his warrant, and place, or cause the same to be placed, in the hands of J. W. Hill, sheriff of Davidson county, Tennessee, reciting that Pullman's Palace Car Company, plaintiff herein, was liable under section 5 of the general revenue acts of the State of Tennessee of 1889, for certain taxes, to wit: the sum of $3,000.00 per year from April 8th, 1892 to April 8th, 1893; and commanding said sheriff to distrain of the goods, chattels, and property of this plaintiff sufficient in amount and value to make, by the sale thereof, the said sum of $3,000.00, with all necessary costs, charges, etc., and, after due advertising, to sell the same, etc., and that acting under said warrant and command said sheriff did distrain and levy upon the sleeping car "Bartholdi," the property of the plaintiff herein, which

22 *which* was then temporarily lying at the union depot in the city of Nashville, in the State of Tennessee, said car having arrived in Nashville on the morning of said 3d day of May, A. D. 1892, from the city of Atlanta, in the State of Georgia, and was due to leave Nashville the same evening for Memphis in the State of Tennessee, said car being engaged in the business of interstate commerce, and thereupon Pullman's Palace Car Company, plaintiff herein, protesting that the said law, embraced in said section 5 of the general revenue acts of the State of Tennessee, approved April 8, 1889, was null and void and in violation of the constitution of the State of Tennessee and of the Constitution of the United States, because the plaintiff was engaged in the business of interstate commerce, and in no other business within the State of Tennessee, and the said tax was a tax levied by the State of Tennessee upon the plaintiff's cars used in the business of interstate commerce, and for the privilege of conducting and carrying on its business of interstate commerce within the State of Tennessee, and that plaintiff entered the State only for the purpose of carrying on its business of interstate commerce; that its sleeping and parlor cars running into, or into, through and out of the State of Tennessee, in the conduct of its said business of interstate commerce, had no domicile within the State of Tennessee; were not taken into Tennessee for the purpose of carrying on any business local to that State; that all of its said cars were engaged exclusively in the business of interstate commerce, and did not have any situs within the State of Tennessee and

that neither the plaintiff nor any of its cars were subject to the jurisdiction of the State of Tennessee for the purpose of assessment and taxation, under compulsion of said warrant in the hands of said sheriff, and in order to prevent the sale of said car, "Bartholdi," the interruption of its interstate-commerce business and a violation of its contract with the railroad company "to furnish cars, etc.," was forced to pay to the said comptroller the said sum of $3000.00, the said taxes so illegally demanded and exacted from it and the plaintiff, on the date last aforesaid, did pay said taxes under protest, within the meaning and intent of the statute of the State of Tennessee, and is entitled to recover the same from the said comptroller.

Wherefore plaintiff sues for $10,000.00 as damages.

JNO. S. RUNNELLS,
WM. BURRY,
WM. L. GRANBERY,
Attorneys for Plaintiff.

Summons issued May 26, 1892.
Declaration filed May 29, 1892.

23 UNITED STATES OF AMERICA, }
Middle District of Tennessee. }

In the Circuit Court of the United States for the Middle District of Tennessee, October Term, 1893.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2913. Law.

The defendant comes by attorney and for plea says: He does not owe the plaintiff the sum averred in plaintiff's declaration or any part thereof, on account of taxes illegally executed and collected of the plaintiff, and of this he puts himself upon the country.

And defendant gives notice that under this plea, he will rely upon the following denials and defenses, to wit:

First.

He denies that he owes any part of the sum sued for.

Second.

He admits the Tennessee statutes did, during the years 1889, 1890, 1891, and 1892, impose upon sleeping car companies, doing business in the State a license tax of $3,000.00 per annum.

He denies that said statute violates any constitutional provision, State or Federal. He denies that the statute imposes or was intended to impose any tax upon the interstate business of such companies, but wholly and alone upon their local and internal business.

He denies that plaintiff did, during said years, do exclusively interstate business within this State, and avers that, on the contrary, it did a large local business, thereby rendering itself liable for such tax.

He denies that plaintiff has no office in Tennessee, if that fact be material.

He denies that all of plaintiff's cars are interstate, but avers that many of its cars run locally within the State, and many others, though running interstate, engage in local internal business.

He denies the alleged contracts between plaintiff and the various railway companies.

He denies that plaintiff pays taxes upon its property used in Tennessee, in any other States, if that be material.

He avers that plaintiff pays taxes upon its property used in Tennessee, in any other States, if that be material.

He avers that plaintiff has endeavored to evade the tax laws of this State by the method of running its cars and by intermingling its internal and interstate business, pretending to do inter-
24 state, while in fact engaged in internal business.

G. W. PICKLE,
Attorney General of State of Tennessee.

Plea filed Oct. 23, 1893.

25 The following stipulation was filed, viz:

United States Court for the Middle District of Tennessee.

PULLMAN PALACE CAR COMPANY *vs.* J. W. ALLEN, Comptroller, etc. } Numbers 2866, 2867, and 2903.

Stipulation.

In these causes it is stipulated that the following is true and may be used in evidence as facts admitted by both parties in the trial

First. During the years 1887, 1888, the plaintiff operated sleeping cars in the State of Tennessee as follows:

Each night a car left Nashville and went to Memphis, and on this car tickets were sold to passengers from Nashville to Memphis and not beyond. This car remained all day in Memphis, being cleaned there, and returned to Nashville the following night, going no further on a continuous trip. It remained all day in Nashville and was cleaned; and then, the following night, went from Nashville, Tennessee, via Chattanooga, to Atlanta, Georgia. It remained all day in Atlanta, was cleaned there, and, then, the following night, returned from Atlanta to Memphis.

On the trip from Memphis, tickets were sold to passengers from Memphis to Nashville, but no further.

On the trip to Atlanta, tickets were sold from Nashville to Atlanta and to all intermediate points, including Chattanooga, and intermediate points within the State of Tennessee.

On the nights these cars left Nashville for Memphis and left Atlanta for Nashville, a car left Memphis for Nashville, and another left Nashville for Atlanta, selling tickets as above set out, from

Memphis to Nashville and intermediate points, and no further; and from Atlanta and intermediate points to Nashville and no further.

The car coming from Memphis to Nashville, went on the trip to Atlanta before making a return trip to Memphis; and the car making the trip from Atlanta to Nashville went on the trip the following night to *to* Memphis before making a return trip to Atlanta. The same cars were not used continuously in this service, but were changed from time to time by plaintiff, but at all times there were four cars of plaintiff performing this service, as above described.

During the year 1887, the East Tennessee, Virginia & Georgia Railroad Company ran two sleepers of its own, doing a busi-
26 ness between Knoxville and Chattanooga, Tennessee.

(*b.*) In the years 1889, 1890, 1891 and 1892, and 1893, the plaintiff has operated sleeping cars between Nashville and Memphis, selling tickets, and carrying passengers from Nashville to Memphis, and no further, on continuous trips, and from Memphis to Nashville, and no further, on continuous trips, and has operated sleeping cars between Atlanta, Georgia, and Nashville, Tennessee, on which it has carried some passengers from Chattanooga and intermediate points, within the State of Tennessee, to Nashville and no further, on continuous trips, all as set out in paragraph first of this stipulation.

During this time, the cars have been changed, from time, to time, at the will of the company, and alternate trips have been made to Memphis and to Atlanta by the respective cars before returning to the initial point.

(*c.*) From 1887 to the present time, on the lines of the Nashville, Chattanooga and St. Louis railway, and of the Louisville and Nashville railroad and of the East Tennessee and Virginia and Georgia railway, now the Southern railway, the Newport News, and Mississippi Valley railroad, the Illinois Central railroad, the Cincinnati Southern railway, and on all other railways within the State, whereon sleeping cars are operated, plaintiff has, upon its sleepers for compensation taken up and carried, and put down, within the State, passengers. Such cars have all been operated under contracts between plaintiff and the several railroad companies the same as the contract attached to the deposition of R. Dean, so far as the issues in these causes are concerned.

Fourth. Plaintiff has, during 1887 to the present time, had agents in Nashville, Chattanooga and Memphis, charged with the duties stated in the deposition of R. Dean stipulated to be read in these causes.

Fifth. This stipulation is not to affect another stipulation herein providing that the deposition of R. Dean and others may be read in these causes.

WM. L. GRANBERY,
Attorney for Plaintiff.
VERTREES AND VERTREES,
Attorneys for Defe-dant.

Filed April 29, 1901.

H. M. DOAK, *Clerk.*

27 The following stipulation and Exhibit "B" was filed, viz:

In the Circuit Court of the United States for the Middle District of Tennessee.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866. Law.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the *Comptroller of the* State of Tenn. } No. 2867. Law.

and

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903. Law.

It is hereby stipulated that the following is a true copy of Exhibit "B" referred to in the depositions of Dean and Bird, in evidence in this cause.

WM. BURRY,
For Plaintiff.
JNO. J. VERTREES,
For Defendant.

EXHIBIT "B."

This indenture made this eleventh day of April, A. D. 1872, between the Nashville and Chattanooga Railroad Company, the party of the first part, and the Pullman Southern Car Company, of the second part:

Whereas the party of the second part is now engaged in the business of manufacturing railway cars known as drawing-room and sleeping cars, under certain patents belonging to them, and of hiring the same to railway companies under written contracts for a term of years, to be used and employed on and over the lines of the road of said railway companies receiving therefor income and revenue by the sale to passengers of berths, seats and accommodations therein;

And whereas the said first party is desirous of availing itself of the use, on and over its lines of road, of the cars constructed under the sleeping and drawing-room car patents, now the property of the second party; also of connections by means of said cars with other lines of railway whereon said cars are now operated by said second party; now this contract witnesseth:

First. That the said party of the second part, in consideration of the covenants and agreements of the party of the first part, hereinafter mentioned, to be by them kept and performed, hereby agrees with the said party of the first part, that they will furnish drawing-room cars and sleeping cars, to be used by said party of the
28 first part for *for* the transportation of passengers, sufficient to meet the requirements of travel over their line of railroad

and on and over all lines of railroad which they now control or may hereafter control by ownership, lease or otherwise, the said cars to be satisfactory to the general superintendent of the said first party.

Second. The said party of the second part hereby agrees that it will keep the carpets and upholstery and bedding of each of the said cars in good order and repair and improve and renew the same, when necessary, at its own expense, except repairs and renewals made necessary by accident or casualty, it being understood that the said party of the first part shall repair all damages to said cars of every kind occasioned by accident or casualty during the continuance of this contract.

Third. The said party of the second part hereby agrees at their own cost and expense to furnish one or more employees, as may be needful, *a* upon each of said cars, whose duties it shall be to collect fares for the accommodations furnished in said cars and generally to wait upon passengers in said cars and provide for their comfort.

Fourth. The said party of the first part hereby agrees that *that* the general officers of the said second party and the employees named in article third of this agreement shall be entitled to free passage over the lines of the first party when they are on duty for the said second party.

Fifth. The party of the second part hereby agrees that the general officers of the first party shall be entitled to free passes in any of the cars furnished by said second party under this agreement.

Sixth. It is hereby mutually agreed that the said employees of the second party, named in article third of this contract, shall be governed by and subject to the rules and regulations of the said first party, which are or may be adopted from time to time, for the government of their own employees, and, in the event of any liability arising against said first party for personal injury, death, or otherwise, of any employee of the said second party, it is hereby distinctly agreed that the said first party shall be liable only to the same extent they would be if the person injured was an employee in fact of said first party, and for all liability in excess shall be indemnified and paid by said second party.

Seventh. The party of the first part, in consideration of the use of the aforesaid cars, hereby agrees to haul the same on the
29 passenger trains on their own line of road and on all roads which they now control or may hereafter control by ownership, lease, or otherwise, and also on all passenger trains on which they, by virtue of contracts or running arrangements with other roads, have the right to use such cars in such manner as will best accommodate passengers desiring the use of said cars.

And the said party of the first part shall, at their own expense furnish fuel for the cars and material for the lights, shall wash and cleanse said cars, and shall also keep said cars in good running order and repair, including renewals of worn-out parts, and all things appertaining to said cars, necessary to keep them in first-class condition, except such as are provided for in article second of this agreement.

Eighth. The party of the first part agrees to furnish to said sec-

ond party, without charge, at convenient points, room and conveniences for airing and storing bedding.

Ninth. The said party of the first part further agrees that the said party of the second part shall, be entitled to collect from each and every person occupying said cars such sums for said occupancy as may be usual on competing lines furnishing equal accommodations and that such rules and regulations shall be mutually agreed upon as will favor the renting of seats and couches in said cars.

Tenth. The party of the first part hereby agrees to permit the party of the second part to place the tickets for seats and couches for sale in such of the railway ticket offices as may be desired by the second party and such service shall be performed by and as a part of the general duties of the ticket agents and without charge to the party of the second part; proceeds of such sales to be at the risk of said second party.

Eleventh. The party of the first part hereby agrees that said second party shall have the exclusive right for a term of fifteen years from the date hereof to furnish for the use of said first party drawing-room cars or parlor cars and sleeping cars, including reclining-chair cars on all the passenger trains of said first party over their entire line of railroad and on all roads which they control or may hereafter control by ownership, lease or otherwise, and also on all passenger trains on which they may, by virtue of contracts or running arrangements with other roads have the right to use such cars, and that they will not contract with any other parties to run said class of cars on and over said lines of road during said period of fifteen years.

Twelfth. The said party of the second part, for the consid-
30 eration aforesaid, hereby guaranties said first party against all damages of whatever kind, which may be by said party of the first part incurred in consequence of any infringement of the patent rights in the construction and use of any os said cars which may be used by said second party upon the lines of said first party under this agreement, it being the meaning and intent of this article that said second party shall secure said first party against all manner of expendirure which may be incurred by said first party in consequence of any litigation connected with alleged infringements of patent rights for the interior arrangements of said cars, and that they will pay off and discharge all judgments obtained at any time against said first party on account of such infringements.

Thirteenth. It is mutually agreed between the parties hereto that in case either of said parties shall at any time hereafter fail to keep and perform any of the covenants herein contained to be by them respectively kept and performed, then, and in that case, after written notice shall have been given to the defaulting party hereto of the default complained of, if the said defaulting party shall refuse or neglect to make good, keep and perform such unful/filled covenants and conditions of this agreement within a reasonable time after such notice the other party shall be at liberty to declare this contract ended and no longer in force.

Fourteenth. It is mutually agreed between the parties hereto that all equipments that may be put upon the road of the first party under

this agreement shall be represented in stock in amount at par value exactly equal to *to* the cost of said equipment, such stock to be either the Pullman Southern Car Company's stock, issued by that company, or to be stock of a *a* new company to be organized by the parties hereto under the name of the Nashville and Chattanooga Car Company.

It is further agreed that said first party shall have the right and option to determine which of the two above-mentioned ways shall be followed—that is, whether, for the equipment to be put upon its road under this agreement, the stock of the Pullman Southern Car Company shall be issued or the stock of a new company, to be organized as above designated; but it is also agreed that such option and right of determination shall be exercised by the first party, if at all, and communicated to the second party in writing within twelve months from the date hereof. In the event of the said first
31 party either failing or neglecting to inform the second party in writing of its conclusions in the premises within the time specified above it is understood between the parties hereto that stock for said equipment shall be issued by the Pullman Southern Car Company.

It is further agreed that each party to this agreement shall be entitled to take, upon paying therefor at the lowest price at which such stock shall have been issued by the party of the second part, one-half of the stock representing the equipment that may be placed upon said first party's road under this agreement.

It is understood and agreed between the parties hereto that the sleeping cars now on the line of the first party, named, respectively, Memphis, Nashville, Virginia, Decatur, Fairview, and Winetka, are hereby accepted and are to be put in first-class condition by the respective parties under the provisions of this contract.

It is agreed that the acceptance of the cars Memphis, Nashville, Virginia and Decatur, as hereinabove recited, is for the period of seven years and six months, or a less time; provided that, in the judgment of the president of the party of the first part, the business shall sooner require better equipment, in which case, the party of the second part hereby agrees to furnish first-class cars in lieu of the cars hereinabove mentioned whenever the said first party shall make requisition for the same and agrees to guaranty the second party gross earnings for each of said cars to be so furnished of three hundred dollars per month.

In witness whereof the party of the first part has caused the corporate seal to be attached hereto by the president and secretary and the party of the second part hath caused its corporate seal to be attached hereto in like manner, attested by its president and secretary.

Dates the day- and years first written above.

[L. S.] NASHVILLE & CHATTANOOGA R. R. CO.,
By E. W. COLE, *President.*

[L. S.] THE PULLMAN SOUTHERN CAR CO.,
By GEORGE M. PULLMAN, *President.*

Attest: S. M. LEMONT, *Secretary.*

EXHIBIT "B"—Continued.

Whereas the Nashville and Chattanooga and St. Louis railway and the Pullman Southern Car Company heretofore, to wit, on the eleventh day of April, 1872, entered into a contract in writing herein and hereafter referred to;

And whereas the said named parties have agreed upon certain changes in said contract, and, in consideration of a settlement
32 growing out of said contract, the terms of which settlement have been fully complied with by both parties, have made the following agreement:

Now, this contract of agreement made and entered into this first day of January, 1879, between the said Nashville, Chattanooga and St. Louis railway, of the first part, and the Pullman Southern Car Company, of the second part, witnesseth:

First. That the Pullman Southern Car Company hereby agrees to furnish the party of the first part the sleeping cars, Fairview, Winetka, and Etowah, the same having been selected and accepted by the party of the first part as being now in good order and condition and equal to the demands of travel on the railroad of the first party and from this date the said Pullman Southern Car Company will maintain said cars in good order and condition at its own expense, so far as ordinary wear is concerned, except as hereinafter excepted and provided for.

Second. In consideration of the above and foregoing obligation, on the part of the Pullman Southern Car Company, the said Nashville, Chattanooga and St. Louis railway hereby agrees, monthly and at the end of each month, to pay said Pullman Southern Car Company three cents per mile for each car run by it on its lines of road, and further agrees and obligates itself to be liable for all damages to any or either of said cars so named or to such other cars as the increase of travel may require to be furnished under this and the original contract referred to, or cars placed in lieu of said cars while shopped on its road during the existence of this contract, except such damages resulting from defective heating apparatus or lighting apparatus or *tl* glass or to globes or to heating and lighting apparatus caused by the employees of the *O*ullman Southern Car Company.

Third. The said Nashville, Chattanooga and St. Louis railway hereby agrees to *to* supply at its own expense all the material necessary for lighting and heating said cars and also to *to* furnish and apply all lubricating material for the journals of said cars and to supply ice and water in sufficient quantities for the use of passengers occupying said cars and shall also wash and cleanse said cars as the same may be required.

Fourth. That Nashville, Chattanooga and St. Louis railway hereby agrees to permit the Pullman Southern Car Company to place its tickets for seats or berths on sale in the ticket offices of the *the* said railway, without charge to the Pullman Southern Car Com-

pany and permit the said Pullman Southern Car Company
33 to collect from each and every person occupying said cars for such occupancy such sum for the same as is usual on competing lines furnishing equal accommodations.

Fifth. The Pullman Southern Car Company agrees hereby that the general officers of the said Nashville, Chattanooga and St. Louis railway shall be entitled to free passes in said cars furnished and to be furnished as aforesaid by the Pullman Southern Car Company under this contract.

Sixth. The said Nashville, Chattanooga and St. Louis railway hereby agrees that the general officers of the Pullman Southern Car Company shall pass free over its said lines of railroad.

Seventh. It is agreed by the parties of the first and second parts hereto that *that* the contract now existing and herein and hereinbefore referred to between them shall be so far changed as that the sleeping cars furnished and to be furnished as herein provided for shall be placed on a mileage basis, to commence from the first of January, 1879, and that said party of the first part shall pay to the party of the second part at the end of each month during the continuance of this contract three cents per mile for each car run over its lines of railroad; this contract to be in full force as if herein reteated for the balance of the unexpired term of the contract entered into between the parties on the eleventh day of April, 1872, or until the eleventh day of April, 1887.

Eighth. It is agreed by the parties hereto that should the party of the second part during the continuance of this contract reduce its mileage contracts with other railroads less than three cents a mile, the benefit of such reduction shall avail to that extent to the party of the first part.

Ninth. It is further agreed that if the air-brake hose is broken from other causes than the effect of wear it shall be replaced by the party of the first part; otherwise by the party of the second part.

Tenth. It is agreed and understood that this contract does not annul the contract entered into on the eleventh day of April, 1872, between the said parties but it is supplemental thereto and changes the same only so far as the same is specifically expressed. All other parts of the original contract are operative.

Signed, sealed and delivered by the legal representatives of the said companies hereto and who have caused to be affixed the corporate seals of their companies respectively hereunto.

For THE NASHVILLE, CHATTANOOGA RAILWAY,
34 J. W. THOMAS, *General Superintendent.*

Attest: R. C. B. VANSFORD, *Sec'y.*

THE PULLMAN SOUTHERN CAR COMPANY.
GEO. M. PULLMAN, *President.*

Attest: A. H. WEINSHIEMER, *Sec'y.*

EXHIBIT "B"—Continued.

Subject: Contract with N., C. & St. L. R. R.

Pullman's Palace Car Company, superintendent's office.

CINCINNATI, *April* 23*d*, 1887.

T. H. Wickes, Esq., general superintendent, Chicago, Illinois.

DEAR SIR: I have to advise you that I have made an arrangement with Col. J. W. Thomas, president and general manager N. C. & St. L. R. R., that until a new contract with his company is agreed to, we will operate the line of sleeping cars over his road under the terms of the old contract, which expired on the eleventh instant.

Very respectfully, JAMES MARTIN,
Superintendent.

35 The following statement as to remission of part of sum sued for of tax of 1887, was filed, viz:

In the Circuit Court of the United States for the Middle District of Tennessee.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866. Law.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867. Law.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903. Law.

We have examined the memorandum from Judge Clark to the clerk concerning the operation of sleeping cars between Memphis, Nashville and Atlanta an- asking that counsel file additional suggestions in regard thereto.

The memorandum speaks of two cars operated between Nashville and Memphis during 1887 and 1888 and asks, what, if any, change was made in the succeeding years. The memorandum also quotes in full the second paragraph of the stipulation.

In that second paragraph mention is made of cars between Nashville, Memphis and Atlanta, but the paragraph states that the cars were operated between those different points as set out in paragraph first of this stipulation.

The first paragraph of the stipulation shows just how the cars were operated. They were operated on a circuit extending from Memphis to Atlanta and return. We consider it immaterial which city is the initial point of the round trip. Each car travelled the circuit, returning to the place whence it started. No weight is attached by counsel for the plaintiff to where the car started on its trip. The

main fact relied on is that each car had its round trip extending from Memphis to Atlanta and return.

Taking, therefore, the first paragraph in connection with the second paragraph, it appears from the stipulation that during all the years from 1887 to 1893, inclusive, cars were operated as above described and our position is that no tax could be levied on account of these cars at any — during any of the years.

Notwithstanding, however, that the stipulation is in the
36 form indicated, there was some discussion between the different parties and their solicitors as to whether there was not during about three years in 1887, two cars operated wholly within the State of Tennessee that never passed beyond the State.

At the same time, (about 1893 or 1894,), there was some discussion with a committee of the legislature as to a new tax act concerning sleeping cars. Without in any way waiving our position that the cars were all operated interstate and without conceding that two cars were, at any time, during 1887 operated locally in the State, and, without conceding that that fact would make any difference in the law (as such local operation might be simply as an incident to the main operation of sleeping cars) it was agreed between the different parties discussing the matter that, in the suit affecting the taxes of 1887, plaintiff would remit or not ask for one thousand dollars, being one year's tax on two cars, together with a proper proportion of interest thereon.

We submit, therefore, that this matter of remitting the one thousand dollars and interest was a matter of compromise only and does not affect the positions taken by counsel or the application of law to the general case.

We insist, as we have always done, that all of these cars at all times ran interstate and that as a matter of strict law, upon the record made, we would be entitled to recover the full amount claimed in all the suits.

As a matter of compromise, however, we have agreed not to ask judgment for the one thousand dollars and interest referred to. We do not think that that agreement affects the law in the case or presents any question to the court for determination. The only way in which it can affect the court is simply that by agreement of parties, plaintiff waives twelve hundred and thirty-four dollars of the amount claimed in suit No. 2867.

WM. BURRY,
W. L. GRANBERY,
For Plaintiff.

I object to the word "compromise" in the above. Understanding it to mean that the plaintiff, without waiving any rights as to the remainder, concedes that its claim should be remitted $1,234.00 in case No. 2867, I sign the above.

JOHN J. VERTREES,
Attorney for Defendant.

37 The following stipulation was filed, viz:

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller, etc.

Nos. 2866, 2867, and 2903, Pending in the Circuit Court of the United States at Nashville, Tennessee.

It is hereby stipulated that upon the hearing of these causes, which are to be heard together by consent, there shall be considered in evidence two receipts, signed by J. W. Allen, of which copies are hereto attached, one dated April 23d, 1892 and one dated August 28th, 1891, and also a letter of J. W. Allen, comptroller, dated August 24, 1891, which is attached to and forms part of said receipt dated August 28, 1891; and also the deposition of Hewitt Craik, J. W. Thomas, W. L. Danley, W. W. Knox, M. J. C. Wrenne, Richmond Dean, and J. F. Bird, which are hereto attached.

WM. BURRY,
WM. L. GRANBERY,
For Plaintiff.
JOHN J. VERTREES,
For Defendant.

The following is the copy of the letter referred to in the foregoing stipulation, viz:

NASHVILLE, TENNESSEE, *August* 24, 1891.

Messrs. Marks & Marks, city.

DEAR SIRS: Yours requesting statement of taxes due the State from Pullman's Palace Car Company to August 28th, 1891, to hand, and I herewith submit statement, *w* showing same, together with interest, etc.

2 cars, Nashville and Memphis, 1897	$1000.00
Interest to date	264.16
Same for 1888	1000.00
Interest to date	204.16
April 8th, 1889 to April 8th, 1890, one year	3000.00
Interest	428.50
April 8th, 1890 to April 8th, 1891	3000.00
Interest	248.50
April 8th, 1891 to April 8th, 1892	3000.00
Interest to date	68.50
Two cars Nashville and Chattanooga, 1887	1000.00
Interest to date	264.16
Same for 1898	1000.00
Interest	204.16
One other car equivalent, on business done on all interstate cars, 1887	500.00
Interest	132.08

Same for 1888	500.00
Interest	102.08
Total	$15,916.30

Very respectfully, W. J. ALLEN, *Comptroller.*

38 The following is the receipt for taxes, referred to, viz:

Pullman's Palace Car Company to J. W. Allen, Dr.

Address: Comptroller of the State of Tennessee, Nashville, Tennessee.

1891.		Amount.
Aug. 24	To amount of taxes required by decision of U. S. Supreme [Court]* for the years shown in annexed statement to be paid to the State of Tennessee. The taxes are paid under protest	$15,916.30
	Approved August 24, 1891. W. T. RANKIN, *Assistant General Counsel.*	
	See also other receipts this day given.	

Examined and found correct.
(Signature) —— ——.

Received from Pullman's Palace Car Company fifteen thousand nine hundred and sixteen, and $\frac{30}{100}$ dollars, in full of the above.
Aug. 28, 1891.

J. W. ALLEN,
Comptroller.

[* Word in brackets erased in copy.]

The following other receipt was filed, viz:

Pullman's Palace Car Company to J. W. Allen, comptroller of the State of Tennessee, Dr.

Address: Nashville, Tennessee.

1892.		Amount.
	For State license tax from April 8th, 1892, to April 8, 1893, required from sleeping-car companies under the law of the State of Tennessee approved April 8, 1889, as follows: Each company doing business in this State, for one or more passengers taken up at one point in this State and delivered at another point in this State and transported wholly within this State, per annum, $3,000.00	$3,000.00
	The above tax is paid under protest.	

Examined and found corroct.
(Signature) J. W. ALLEN.

Received from Pullman's Palace Car Company, three thousand dollars in full for the above.
Nashville, May 3d, 1892.

J. W. ALLEN,
Comptroller.

The following deposition was filed, viz:

HEWITT CRAIK, being first called and sworn, deposed as follows:

Q. 1. State your residence and occupation?
Answer. Residence, Nashville; occupation, Pullman-car conductor.
Q. 2. Are you engaged on the line of sleepers running be-
39 tween Nashville and Memphis, Tennessee? If so, how long have you been so engaged?
Answer. There is no line running between Nashville and Memphis. The line is between Memphis and Atlanta and No. 525 running by Nashville.
Q. 3. Please state the time your cars make—that is the time of -our departure and arrival at Nashville, Memphis and Atlanta?
Answer. We leave Memphis at 9.50 p. m., reach Nashville at 7 a. m. next morning, lie in Nashville all day, leave at 8.15 p. m. for Atlanta, reaching there at 6.32 a. m. the following morning, reaching Nashville at 5.10 a. m. next morning, lie there all day, leaving at 7.35 p. m., arriving in Memphis at 5.15 the following morning.
Q. 4. Was this schedule in force during the year 1889 and did

you operate sleeping cars on this schedule during any portion of that year?

Answer. No sir.

Q. 5. Did you, at any time during the year 1889, receive one or more passengers on your car at a point within the State of Tennessee and transport them to another point in this State, they being transported -holly within the limits of this State?

Answer. Yes.

HEWITT CRAIK.

Sworn to and subscribed before me this the 21st day of April, 1890.

E. R. CAMPBELL,
U. S. Dist. Clerk.

The following deposition was filed, viz:

In the Circuit Court of the United States for the Middle District of Tennessee.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller, etc.

Deposition of J. W. Thomas, witness for the defendant in the above cause, taken upon notice, on the 22nd day of October, at the office of Champion, Head and Brown, Cole building, Nashville, Tennessee, in the presence of S. A. Champion, attorney for defendant; no one present for the plaintiff.

The said witness, being duly sworn, deposed as follows:

Int. 1. Please state what connection you have with the Nashville, Chattanooga and St. Louis railway and how long you have filled that position?

Ans. Am president and general manager. Have been president five years and general manager nine years.

Int. 2. How many cars does the complainant run over your line and under what contract?

Ans. Four sleepers and two parlor cars. We pay three
40 cents per mile*a* for the sleepers and two and a half cents per mile for the parlor cars.

Int. 3. If you know, name the cars, that run between Nashville and Memphis.

Ans. Do not remember the names of the cars.

Int. 4. State if it is not the custom of the cars that make the run between Nashville and Memphis to come from Louisville or Atlanta, arriving in Nashville in the morning and remain here until about seven o'clock in the evening and then continue their trip to Memphis.

Ans. The parlor cars are between Nashville and Atlanta, leaving Nashville 7.30 a. m. and Atlanta 6.30 p. m., leave Atlanta 8 a. m., arrive at Nashville at 7 p. m. Sleepers reach Nashville at 5 a. m.,

lie over until 7 p. m. and reach Memphis about 5 a. m. Returning, leave Memphis 10 p. m., arrive at Nashville 7 a. m., lie over until 8 p. m., reach Atlanta 6 a. m.

Int. 5. Please state if tickets are ever sold for Atlanta or intermediate points for points beyond Nashville to be used upon sleepers arriving at Nashville in the morning.

Ans. Don't know.

Int. 6. Do the sleeping cars leaving Nashville in the evening ever go to points beyond Memphis?

Ans. Very seldom, if ever.

Int. 7. Do the sleeping cars reaching here from Memphis in the morning invariably go to Atlanta in the evening?

Ans. As a general rule they do. There may be occasional exceptions.

Int. 8. Are certain specific cars assigned to the service on your road or does the complainant exercise its own convenience and make frequent changes?

Ans. Four sleepers are assigned to our road and they are not changed, except for repairs or in case of accidents.

Int. 9. How long has the custom above described prevailed, and state if, until recently, two cars or more did not do the entire service between Nashville and Memphis and not go elsewhere?

Ans. I think so; but I do not know when the change was made.

Int. 10. From whose office could we get that information?

Ans. The records of the movements of the cars are kept in the superintendent's office.

Int. 11. State if you do not know that this change was made for the purpose of avoiding the privilege tax.

Objected to by plaintiff.

41 Ans. I think so, but do not know positively.

Int. 12. How many cars were used between Nashville and Memphis before the change was made?

Ans. Two.

Int. 13. The parlor cars running between Memphis and Nashville invariably lie over at Nashville and Memphis during the night, do they not? Or was not this the custom before the parlor car was discontinued — Nashville and Memphis?

Ans. No parlor car line between Nashville and Memphis for some months past. When the line was run, the cars laid over at night at Nashville and Memphis.

Int. 14. State if they did not run alone between Nashville and Memphis and when was the line discontinued?

Ans. Do not know when the line was discontinued. Records of the superintendent's office. Two cars ran exclusively between Nashville and Memphis.

Int. 15. Is it not true that the sleepers arriving in Nashville in the morning from Atlanta and Memphis could make close connection instead of lying over all day?

Ans. Could do so if the railroads were willing to bear the expense of hauling them on day trains which we are not.

And further deponent saith not.

J. W. THOMAS.

Plaintiff's counsel objects to all of Mr. Thomas' testimony which relates to parlor cars.

The foregoing deposition was taken before me as stated in the caption and reduced *the* writing by me. And I certify that I am not interested in the cause, nor of kin or counsel to either of the parties and that I sealed *them* up and delivered them to the clerk of the United States circuit court, without being out of my possession or altered after it was taken.

Given under my hand and seal this the 22nd day of October, 1889.

EDWIN A. PRICE,
Commissioner and Notary Public.

[SEAL.]

Commissioner's Costs.

Taking deposition, 805 words	$1.60
Subpœna	.50
Certificate	.15
	$2.25

42 The following depositions were filed, viz:

In the U. S. Circuit Court.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller, etc.

Depositions of W. L. Danley, W. W. Knox, and M. J. C. Wrenne, witnesses for the defendant in the above-styled cause, taken upon notice upon the 23d and 29th days of October, 1889, at the office of Champion, Head and Brown, Cole building, Nashville, Tennessee, in the presence of attorneys for both parties.

Said witnesses, being of lawful age, were first duly sworn, and deposed as follows:

W. L. DANLEY, of competent age, being duly sworn, deposed as follows:

Quest. 1. Please state what positions you occupy and how long you have been so engaged.

Ans. I am general passenger and ticket agent of the Nashville, Chattanooga and St. Louis railway, since September, 1868.

Quest. 2. How many sleeping and parlor cars have been used by your company since and during 1886?

Ans. That is a matter of record in the transportation department, and I could not say.

Quest. 3. Assuming that four Pullman sleeping cars ran over your road, please state when they arrive in Nashville and when — take their departure?

Ans. They usually arrive here in the morning between, say, five and seven and one-half o'clock and leave between seven and eight-fifteen at night.

Quest. 4. Why are these cars detained at Nashville during the day?

Ans. They are detained here, because we run no sleeping cars over our lines in the daytime and it is also necessary to clean-e them which they do here.

Quest. 5. Please state if it was not the system of the company, until recently, to run two cars between Nashville and Memphis, and the cars assigned to this line did not go elsewhere? And, if a change has been made, why was that done?

Ans. During part of the time, I think that they had two cars assigned to Nashville—Nashville and Memphis line. I don't know about the change.

Quest. 5. Who sells the tickets of the complainant over your line?

Ans. By W. W. Knox, ticket agent, Union depot, and A. H. Robinson, ticket agent at the Maxwell house.

43 Quest. 6. Is it not true that the change under which these cars, running exclusively between Nashville and Memphis, were discontinued — for the purpose of avoiding the payment of the privilege tax assessed by the legislature?

Ans. All changes which have been made — at the instance of the Pullman Company and they have never assigned any reason for the changes to me.

Quest. 7. State, as nearly as you can, about what the gross earnings received by the Pullman Company from local traffic would amount to for the year?

Ans. I have very little idea what their gross earnings are.

And further deponent saith not.

W. I. DANLEY.

Counsel for plaintiff objects to all of Mr. Danley's testimony which relates to parlor cars and also all his testimony about movement of cars, as he does not appear to speak from his own knowledge of them.

Witness W. W. Knox, aged 45 years, being duly sworn, deposed as follows:

Int. 1. What position do you occupy and how long have you been thus employed?

Ans. Ticket agent at the Union depot in Nashville since February, 1884.

Int. 2. Do you, by yourself, or through others, sell tickets for the Pullman Palace Car Company? If so, under what sort of contract with the plaintiff?

Ans. I am their agent by instructions from the management of the railway company.

Int. 3. What compensation, directly, or indirectly, does the railroad company get for this service?

Ans. I do not know.

Int. 4. State if the tickets sold are ever sold on the sleeper that goes to Memphis at night to points beyond Memphis.

Ans. No, sir.

Int. 5. Why not?

Ans. The sleeper runs only to Memphis.

Int. 6. Does the same sleeper return to Nashville the next night? If so, are tickets ever sold from that point to points beyond Nashville?

Ans. I do not know.

Int. 7. How many sleepers run between Memphis and Nashville?

44 Ans. One from Nashville to Memphis every night and one arriving at Nashville from Memphis every morning.

Int. 8. Please give the names of the sleepers assigned to the Nashville, Chattanooga and St. Louis railway?

Ans. I do not know.

Int. 9. During what period were certain cars used exclusively between Nashville and Memphis?

Ans. Well, I can't tell, because I don't know to what line the cars were assigned.

Int. 10. Is it not true that, until recently, two cars belonging to Pullman's Palace Car Company, were run exclusively between Nashville and Memphis and no other cars were used for that purpose, except when these were withdrawn for repairs or in case of accident?

Ans. I have understood that such was the case, but do not know of my own knowledge. I keep no records of any kind, of the movements of sleeping cars.

Int. 11. If such was the case, when, according to the best of your information, was this custom discontinued?

Ans. I can't say, of my own knowledge, that it is discontinued, because I know nothing about it.

Int. 12. State, as near as you can, the amount derived from the sale of sleeping-car tickets sold at your office, annually, to be used between Nashville and Memphis?

Ans. I think between two and three thousand dollars.

Int. 13. The amount between Nashville and Chattanooga?

Ans. Not over one hundred dollars a year.

Int. 14. That is because the sleeper goes to Atlanta, is it not?

Ans. Yes, sir.

Int. 15. How many cars are used by the Nashville, Chattanooga and St. Louis railway and between what points do they run?

Ans. Two used between Nashville and Atlanta.

Int. 16. How long have these cars been discontinued, between Nashville and Memphis?

Ans. I do not know.

And further this deponent saith not.

W. W. KNOX.

Counsel for plaintiff objects to all of Mr. Knox's testimony which relates to parlor cars and to all statements made by him concerning matters not within his own knowledge.

45 Witness M. J. C. WRENNE, aged forty-two years, being duly sworn, deposed as follows:

Int. 1. How and where are you engaged and how long have you been engaged in that capacity?

Ans. Superintendent of the Nashville, Chattanooga and St. Louis railway and have been so engaged since 1880.

Int. 2. What are your duties?

Ans. Have charge of the transportation department.

Int. 3. How many Pullman sleeping cars and parlor cars are assigned to your road?

Ans. Four sleepers and two parlor cars.

Int. 4. How long have these cars been used by your road?

Ans. The cars we are using now, we have had, possibly two years, or more; we may not have had them so long. I do not remember when we got the parlor cars.

Int. 5. How many cars run between Nashville and Memphis?

Ans. It takes two cars to fill the line between Nashville and Memphis.

Int. 6. State if it is true that, until recently, two cars ran exclusively between Nashville and Memphis; and, if so, when was this custom commenced and when discontinued?

Ans. For the last 16 or 18 months, more or less, two cars were running between Memphis and Nashville, unless replaced by other cars, when these cars were in shop. This was so until about the first of September, when the cars began to alternate trips between Memphis and Atlanta.

Int. 7. State if these cars, while they were thus engaged, were not the only sleepers used in that service, except temporarily, in case of accident, or when withdrawn for repairs?

Ans. These four cars in question came to us as new cars, two of them, for a while, ran between Nashville and Atlanta and were transferred to the Memphis line, or the contrary.

Int. 8. Why were these changes which you mention in your last answer, made?

Ans. The changes were made by the Pullman people to get the cars in line to suit themselves.

Int. 9. Was there any reason for it known to you?

Ans. The cars came at different periods and the two newest ones were put in the preferred line.

46 Int. 10. Is it not true that the two cars, or some other two cars, belonging to the plaintiff, were used exclusively between Nashville and Memphis during the years, 1885, 1886, 1887, and 1889? If not, please state, from your books, just what portion of this period the custom covered.

Ans. Will examine my books and attach my answer as an exhibit to this deposition.

Int. 11. Please explain the difference in the use of the parlor and sleeping cars?

Ans. The sleeping car is fitted up with beds and the parlor car has only chairs in it. The parlor cars are used on the day trains and the sleepers on the night trains.

Int. 12. How long since you quit using the parlor cars between Nashville and Memphis?

Ans. About May 12th, 1889.

Int. 13. How many had been used before that time and for what length of time?

Ans. Two; for about a year.

Int. 14. Please examine your books and state the exact time and the dates?

Ans. I will do so.

N. B.—The further taking of this deposition was adjourned until 3 p. m. October 28, 1889.

EDWIN A. PRICE,
Commissioner.

The taking of the deposition of M. J. C. Wrenne, was resumed at 10.30 a. m. of October 29th.

Present: Wm. Burry, attorney for plaintiff, and J. M. Head for defendant.

Int. 15. How many sleeping cars are necessary to transact the business between Nashville and Memphis?

Ans. Ordinarily two cars are leaving Nashville and Memphis each night.

Int. 16. Was this number of sleeping cars used by your road between Nashville and Memphis during the years 1887 and 1888.

Ans. Yes, sir.

Int. 17. Were these cars furnished by the plaintiff, The Pullman's Palace Car Company?

Ans. Yes, sir.

Int. 18. Is it necessary for the convenience of the travelling public that the sleeping cars doing the business between
47 Nashville and Memphis, should, at any time, go outside of the State of Tennessee?

Ans. Not if the cars are in first-class running order.

Int. 19. Give the time that these cars left Nashville, these sleeping cars, left Nashville and Memphis, and when they arrived at each of these points, during the years 1887 and 1888.

Ans. The sleepers left Nashville between the hours of 7 and 8 p. m., arriving in Memphis between 4 and 6 a. m.; leaving Memphis between 9 and 11 p. m. and arriving in Nashville about 7 a. m.

Int. 20. At what time did these sleepers, arriving in Nashville and Memphis, respectively, during the morning, leave these points, during the years 1887 and 1888.

Ans. The following evening if to go back over the same line.

Int. 21. During the years 1887 and 1888, were the sleeping-car tickets ever sold from Nashville or Memphis or any intermediate — to a point beyond the limits of Tennessee?

Ans. I can't answer as to where the tickets are sold to.

Counsel for plaintiff objects to all of Mr. Wrenne's testimony which in any way relates to parlor cars.

Cross-interrogatories:

X Int. 1. In answer to interrogatory 16, you stated that two sleeping cars were run between Nashville and Memphis during 1887 and 1888. Did you mean that only two different sleeping cars were run between those points during that time?

Ans. No sir; I meant that two cars would fill the line and they were liable to be charged by the Pullman people and were often charged.

X Int. 2. Did your company sometimes, during that period, call upon plaintiff for extra sleeping cars to meet the emergencies or unusual demands of business?

Ans. Yes, sir; when business demanded extra sleepers were asked for and, if the Pullman Company had them, they were furnished.

X Int. 3. Please state by months the number of different sleeping cars operated by plaintiff over your railroad between Nashville and Memphis, during 1887–'8?

Ans. I find that 1887 in

January,	eight	different cars.
February,	nine,	" "
March,	ten,	" "
April	eighteen,	"
May,	eleven	

48

June,	eight	different cars.
July,	eleven,	" "
August,	thirteen,	" "
September,	eight,	" "
October,	fourteen,	" "
November,	nine,	" "
December,	nine,	" "

In 1888, in—

January,	ten	" "
February,	nine,	" "
March.	seven,	" "
April,	six,	" "
May,	eleven,	" "
June,	six,	" "
July,	four	" "
August,	five,	" "
September,	six,	" "
October,	two,	" "
November,	two,	" "
December,	four,	" "

X Int. 4. Please state how many different cars were so used in 1887.

Ans. I find that there were forty-one cars used in 1887.

X Int. 5. Please state the number so used in 1888.

Ans. Twenty-six.

X Int. 6. You spoke of cars being assigned to your road by the

Pullman Company. Do you mean by that the allotment of certain specific cars to your road, which the Pullman Company was not at liberty to change to suit the emergiencies of its business?

Ans. The cars belong to the Pullman Company and they can change them at any time they want to.

X Int. 7. Then by what you said in that regard you simply meant that the plaintiff was required to do a certain amount of sleeping-car service on your railroad, using good equipments therefor and that you — a certain number of cars, if run continuously, could do that service?

Ans. Yes, that is the idea.

X Int. 8. Does your road extend beyond this State and to what point?

Ans. The main line of the Nashville, Chattanooga and St. Louis railway runs from Chattanooga, Tennessee, to Hickman,
49 Kentucky, passing through portions of the States of Alabama and Georgia between Chattanooga and Nashville.

X Int. 9. Does not your road connect with the Louisville and Nashville railroad at McKenzie and Nashville and are not your trains run so as to make connection with the L. & N. trains at those points as a general thing?

Ans. Yes, our trains connect with the Louisville and Nashville trains at McKenzie and Nashville.

X Int. 10. During 1887–'8, were there any through Pullman sleeping cars running from Louisville over your road to points in Georgia or Florida?

Ans. We had a line of sleepers running from Louisville to Jacksonville, Florida, during the year 1887.

X Int. 11. Have the Pullman Company any shops in Tennessee, where they can do all necessary repairing to their cars?

Ans. I know of no shops in Tennessee.

X Int. 12. Are there any on your line of railroad?

Ans. No sir.

X Int. 13. The contract in evidence between your company and plaintiff, requires plaintiff to furnish your company all sleeping cars needed for operation on your road. Does your company, under that contract, require it to operate sleeping cars over that part of your road lying between Nashville and Memphis?

Ans. If the contract exists it is in the hands of the president and general manager and I am not conversant with its requirements. I understand that the Pullman Company are to furnish sleepers for our night trains between Nashville and Memphis, which they do at our request.

Redirect examination:

Int. 1. I will ask you, Mr. Wrenne, if the sleeping cars operated by your company between Nashville and Memphis could not be discontinued without in any way interfering with the use of sleepers upon the remainder of your line of road?

Ans. There is no connection whatever between the sleepers used between Nashville and Memphis and the other parts of the line.

Objected to as immaterial.

Int. 2. I understand you to say that the two sleeping cars were necessary for the transaction of business between Nashville and Memphis during the years 1887 and 1888?

Ans. Yes sir.

50 Recross-examination:

Int. 1. Does not the proper operation of your road call for the running of sleeping cars between Nashville and Memphis?

Ans. Yes sir; on night trains.

Int. 2. Did not the cars passing from Memphis during all or almost all of 1887 and 1888 run to Louisville, Kentucky, before returning to Memphis?

Ans. I don't know if they went to Louisville. They were cars in the Pullman service and might have been in the line leading to Chicago, St. Louis, Cincinnati, New Orleans, or Atlanta.

M. J. C. WRENNE.

The foregoing depositions were taken by me as stated in the caption and were reduced to writing by me and counsel in the cause. And I certify that I am not interested in the cause, nor of kin or counsel to either of the parties and that I delivered them to the clerk of the United States circuit court at Nashville, without being out of my possession or altered after they were taken.

EDWIN A. PRICE,
Commissioner.

All formalities as to caption and certificate are hereby waived.

CHAMPION & HEAD,
Attorneys for Defe-dant.
WM. BURRY,
Solicitor for Complainant.

Commissioner's Costs.

Taking depositions, 2662 words	$5.32
Certificate	.15
Subpœna	.50
	$5.97

51 The following depositions were filed for plaintiff, viz:

UNITED STATES OF AMERICA.

NORTHERN DISTRICT OF ILLINOIS, } ss:
County of Cook, }

Be it remembered that, on this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, I, K. G. Todd, a notary public, did call and cause to be and personally appear before me, at my office, at the four and -lace designated in the notice attached hereto as Exhibit A, in the city of Chicago,

Richmond Dean, and James F. Bird, to testify and the truth to say, on the part and behalf of the complainant in a certain civil cause or matter of controversy, now depending and undetermined in the circuit court of the United States for the middle district of Tennessee at Nashville, wherein Pullman's Palace Car Company is complainant and the comptroller of the State of Tennessee, formerly P. P. Pickard, now J. W. Allen, is defendant.

At the taking of said depositions I was attended by Wm. Burry, solicitor for complainant and by Mr. Head, solicitor for the defendant.

And the said RICHMOND DEAN, being about the age of twenty-nine years and having been first by me duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, was examined by Mr. Burry on behalf of complainant and he did thereupon depose, testify and say as follows, viz:

Mr. Dean was not mentioned in the notice attached as Exhibit A, but by agreement of counsel he was called in place of Mr. Garcelon, mentioned in the notice.

Int. 1. State your name, residence and occupation?

Ans. 1. Richmond Dean, Chicago, assistant to the general superintendent of Pullman's Palace Car Company.

Int. 2. Do you know the contract under which the Pullman Company is operating sleeping cars upon the lines of the Nashville, Chattanooga and St. Louis Railway Company?

Ans. 2. Yes, sir.

Int. 3. Will you please produce and give to the notary to be attached as Exhibit B, a copy of that contract?

Ans. 3. Yes, sir.

Int. 4. Do you know generally the terms of the contract for operating sleeping cars between the Pullman Company and the Louisville and Nashville Railroad Company?

52 Ans. 4. Yes, sir.

Int. 5. Do you know generally the terms of the other contracts under which the Pullman Company operates sleeping cars in Tennessee?

Ans. 5. I am conversant with the general terms of all the contracts.

Int. 6. Are they substantially similar to the Louisville and Nashville contract just referred to?

Ans. 6. They are all similar under which we are operating cars in Tennessee, in general terms.

Int. 7. The complainant has conductors and porters from time to time in Tennessee with its cars?

Ans. 7. Yes.

Int. 8. Has it any other agents or representatives in Tennessee?

Ans. 8. We have three: R. Donaldson, agent at Chattanooga; G. C. Chase, agent at Memphis; and George Zoeller, agent at Nashville.

Int. 9. State generally what the duties of those agents are.

Ans. 9. Their duties are confined to seeing that men are provided for the cars when they leave on their runs; that they are properly furnished with supplies, such as soap, towels, etc., necessary to the operation of the cars. They also superintend the cleaning of the cars, to see that they are kept in proper condition.

Int. 10. Do they have any general powers over the management of the company's cars?

Ans. 10. No. They have no authority delegated to them whatever. They act entirely under the direction of the division superintendent.

Int. 11. Where is he situated?

Ans. 11. In this case, the lines in Tennessee are under Superintendent Martin at Philadelphia.

Int. 12. Have these agents any power to make contracts, or arrange about the movements of the cars, except as they are directed in each case by some superintendent of the company?

Ans. 12. None whatever.

Int. 13. Have they any other duties than that of keeping the car in proper condition?

Ans. 13. No. None that I recall. Those are their principal duties.

Int. 14. I think you said that complainant is now operating its cars under the terms of the old contract, Exhibit B?

Ans. 14. Yes, under the old contract. The Nashville, Chat-
53 tanooga and St. Louis.

Cross-examination:

Cr. Int. 1. Could you give me the number of cars owned by your company?

Ans. 1. In the neighborhood of two thousand. I cannot say exactly.

Cr. Int. 2. Could you give me the average cost of these cars?

Ans. Objected to as immaterial.

Ans. 2. Well, that I could not give without consulting records. I am not conversant with the cost of all the cars we operate.

Cr. Int. 3. What is the average capacity of each of your cars for passengers?

Ans. 3. We figure, as a rule, in furnishing cars, that they would contain ten sections or twenty berths. The majority of them have more than that number, but, generally speaking, in furnishing a car, where we do not have the number designated, we furnish ten sections of twenty berths.

Cr. Int. 4. You state that the copy of contract and amendment which you have filed as Exhibit B of your answer, with the Nashville, Chattanooga and St. Louis Railway Company covers the years 1887, 1888, and 1889?

Ans. 4. Yes sir.

Cr. Int. 5. Does your company pay any compensation for the sale of its tickets by the railway company's agents who serve you?

Ans. 5. No sir; none whatever.

Cr. Int. 6. I believe each of your sleeping cars has a separate name?

Ans. 6. They are known either by name or number.

Cr. Int. 7. Could you give the names or numbers of the various cars operated in Tennessee during the years 1887 and 1888?

Ans. 7. No sir; I could not. The cars are interchanged. I could not give the numbers or names.

Cr. Int. 8. About how many were operated in and through the State during the years 1887 and 1888?

Ans. 8. The service of the lines was likely in the neighborhood of 75.

Cr. Int. 9. Could you give the names of the cars operated by the Nashville, Chattanooga and St. Louis Railway Company during the years 1887 and 1888?

Ans. 9. No. I don't recall them; but will refer to the books and state them as a part of this deposition.

54 Cr. Int. 10. Will you also give the run of each of these cars during that time?

Ans. 10. Yes we can give that also. The records from which answers to this question and the one before it can be best prepared are not kept in my office, but in the auditor's office; and Mr. Bird of the auditor's office has answered them. I have read his answers and believe them to be correct.

Cr. Int. 11. Do not the records of your office show the point from which and to which every passenger who uses your cars travels?

Ans. 11. The diagrams would show that; but I believe it is customary only to retain them for a certain time. They are not in our office and I could not speak distinctly on that subject.

Cr. Int. 12. Does your company issue stop-over or transfer tickets from one car to another?

Ans. 12. In some cases they issue what is called a transfer. If a car breaks down en route and another car is available to receive its passengers we transfer them. It is always for continuous trips.

Cr. Int. 13. Then your tickets are only for continuous trips.

Ans. 13. Yes sir.

Cr. Int. 14. Do the records of your office show a single instance where a ticket was purchased for a continuous trip from Nashville to Memphis or any intermediate point to a point outside of the State of Tennessee?

Ans. 14. *O* cannot say; we have nothing to do with the handling of checks.

J. F. Bird, witness of lawful age, being produced on behalf of complainant and being duly sworn to testify to the truth, the whole truth and nothing but the truth, deposes and says.

Int. 1. State your name, residence and occupation?

Ans. 1. James F. Bird, Chicago, auditor of receipts of the Pullman Company.

Int. 2. Are the diagrams and other reports of conductors showing the passengers carried on different cars of the Pullman Company returned into your office?

Ans. 2. They are.

Int. 3. Are the regular runs of cars returned into your office?

Ans. 3. The diagrams are.

Int. 4. Are you, generally speaking, conversant with the lines of the Pullman Company that run into or through Tennessee?

55 Ans. 4. In a general way, yes.

Int. 5. Can you state generally the *gross receipts of* the Pullman Company per year for the last three years from lines running into Tennessee?

Ans. 5. The amount would be in the neighborhood of $500,000.00 per year.

Int. 6. Please also give a like approximation of what amount of those total gross earnings are taken from passengers carried locally in Tennessee on any of those lines?

Ans. 6. Generally speaking, about $25,000 per year.

Int. 7. During the year 1897, were any cars run locally in Tennessee, that is, were any cars run between points and upon lines lying wholly in the State of Tennessee?

Ans. 7. I believe not.

Int. 8. Do the regular trips of all the Pullman cars in service on lines which lie partially within Tennessee take them also outside of the State?

Ans. They do.

Cross-examination:

Cr. Int. 1. Are you familiar with the name and run of the cars operated in Tennessee, running between Nashville and Memphis.

Ans. 1. By referring to records names could be given.

Cr. Int. 2. Will you, by reference to your records, give the names and run and time of the cars operated between Nashville and Memphis during the years 1887 and 1888?

Ans. 2. I will. By examination of the records of my office, I find that the following sleeping cars ran between Nashville and Memphis over the Nashville, Chattanooga and St. Louis railway during 1887 and 1888:

1887.	1888.
Names of cars.	Names of cars.
Angora.	Antilles.
Antilles.	139 Arctic.
Bolivar.	Biloxi.
Biloxi.	Bartholdi.
182 Conestoga.	Caledonia.
Caledonia.	182 Conestoga.
Carbondale.	Celtic.
Delta.	134 Capri.
255 Dayton.	Delta.
Elmore.	255 Dayton.
Escort.	Elmore.
178 Elkmont.	178 Elkmont.
Eureka.	Fairview.

Ephesus.
Galatin.
Glendale.
Guthrie.
Hiawatha.
India.
56 Java.
Kennesaw.
Louisville.
Lavaca.
Monticello.
Paoli.
Palmetto.
Pontotoc.
146 Saranac.
Siesta.
Tuscumbia.
Tacitus.
Talladega.
Tiara.
Westerly.
Winetka.
Woodland.
Garden City.
Guthrie.
Hermione.
Hispania.
Kalamazoo.
Louisville.
Lavaca.
Loretto.
Monticello.
Paoli.
Pharos.
Pncelet.
Serapis.
Winetka.

None of these cars were operated exclusively over the Nashville, Chattanooga an- St. Louis railway, during 1887 and 1888, but they were also operated over many other lines of railroad and in other States.

On their runs between Memphis and Nashville, these cars, in going from Memphis to Nashville, left Memphis in the evening and arrived in Nashville in the morning. In going from Nashville to Memphis, they left Nashville in the evening and arrived at Memphis in the morning. The many points other than Memphis and Nashville, to which these cars ran during 1887 and 1888, and the times of their arrival and departure, are not, as I understand the question, called for in this answer. Ascertaining them would take a very long time, covering so much territory and could not be done in a week. The cars that ran from Memphis to Nashville during all of 1887 and the greater part of 1888 were required to run on from Nashville to Louisville, returning to Memphis by the same route.

Cr. Int. 3. Are the conductors' berth checks that are issued to each pass-nger returned into your office?

Ans. 3. They are.

Cr. Int. 4. Do these checks not always show the point from which and to which every passenger using your cars travels?

Ans. 4. They do.

Cr. Int. 5. Have you those checks now in your custody or control?

Ans. 5. They are retained only a short time. None for the years 1887 and 1888 are now in existence.

Cr. Int. 6. Do the conductors' reports show the fact?

Ans. 6. They do.

Cr. Int. 7. Have you these reports on file for 1887 and 1888?

Ans. 7. Yes. A few may be missing, but generally speaking they are on file.

Cr. Int. 8. Do the records of your office show an instance where a passenger purchased a seat from Nashville to Memphis or
57 from Memphis to Nashville and -n the same continuous trip passed to a point outside of the State of Tennessee?

Ans. 8. I can only tell by reference to the records.

Cr. Int. 9. Will you examine your records and answer that question?

Ans. 9. I will. I have examined the records and been unable to find any.

Cr. Int. 10. I will ask you if the cars used by the Nashville, Chattanooga and St. Louis railway between Nashville and Memphis, do not make those points as one trip for 1887 and 1888?

Ans. 10. After examining the records, I find that during all of 1887 and the greater part of 1888, the cars leaving Memphis and going direct to Nashville were required to go to Louisville before returning to Memphis, their regular trip being from Memphis to Louisville and return. During the latter part of 1888 the different sleeping cars going from Memphis to Nashville usually returned the following night to Memphis, unless they were ordered away to some other point and some other car sent to Memphis in their place.

Cr. Int. 11. Could you tell how many different cars were used during the years 1887 and 1888 between Nashville and Memphis?

Ans. 11. By examining the records I find there were 36 in 1887 and 27 in 1888.

Cr. Int. 12. You state in your direct examination that the gross earnings of all cars operated in or through Tennessee amount to about $500,000 per annum. About how many cars would it require to perform that service?

Ans. 12. Generally speaking about 100.

Cr. Int. 13. You say in your direct examination that all cars used in the State of Tennessee pass to a point outside of the State of Tennessee in their regular trip. Please designate the point to which the cars running between Nashville and Memphis pass outside of the State of Tennessee.

Ans. 13. To the best of my memory one point is Louisville.

Cr. Int. 14. Was this running arrangement in force during the years 1887 and 188-.

Ans. 14. During all of 1887 and the greater part of 1888.

Cr. Int. 15. Will you give the time made by these cars between Louisville and Memphis in continuous trips, passing by Nashville.

Ans. 15. I shall be obliged to refer to the records and will then do so. The cars usually left Louisville in the evening, arriving in Nashville next morning and left there for Memphis that
58 evening, arriving in Memphis the following morning.

Cr. Int. 16. What do you mean by the run of a car?

Ans. 16. Its usual route.

Cr. Int. 17. What do you mean by a continuous trip?

Ans. 17. A trip in which there is no lay-over.

Cr. Int. 18. Do I understand you, then, to mean that the run of a car running between Louisville, via Nashville, and Memphis, makes a continuous trip?

Ans. 18. No- so; I do not think they do.

Cr. Int. 19. I will ask you further, if the line of railroad between Louisville and Nashville is not owned by the Louisville and Nashville Railroad Company, and that between Nashville and Memphis by the Nashville, Chattanooga and St. Louis Railway Company?

Ans. 19. I believe so.

Redirect examination:

Int. 1. You have been asked several questions about cars running between Nashville and Memphis in 1888. I will ask you about all other cars of complainant, operated in Tennessee, if any of them run solely between points within Tennessee, or if they run from without the State into it during that time?

Ans. 1. None whatever ran local. All were interstate.

Int. 2. Do cars of complainant always remain upon the same route?

Ans. 2. They do not.

Int. 3. Do cars run- between any two points such as Nashville, Tennessee, and Atlanta, Georgia, sometimes get changed off into other runs?

Ans. 3. They do.

Int. 4. Does this occur frequently?

Ans. 4. It does.

Int. 5. What governs such changes?

Ans. 5. The operating department can best answer that question. I presume for convenience of operating, or to meet demands of travel.

Int. 7. Is the operation of cars and keeping accounts and ascertaining them easier when they are operated in long lines or short ones for the same number of miles operated?

Ans. 7. In long lines.

59 This was all the evidence.

Upon this evidence the court made the following special finding of facts, viz:

In the Circuit Court of the United States for the Middle District of Tennessee.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903.

Special Finding of Facts.

These cases were tried before me by consent, without a jury, upon an agreed statement. I find therefrom the following to be the facts.

1. The defendant, J. W. Allen, was the comptroller of the treasury of the State of Tennessee and the proper officer to demand and receive the taxes which were paid to him, as hereinafter stated by the plaintiff, if the taxes were lawfully demandable by any one; and

2. The plaintiff was, and is, a sleeping car company, operating sleeping cars during the years from 1887 to 1893, inclusive, in Tennessee, in the manner and as hereinafter stated; and

3. It was operating such cars on railroads lying partly within and partly without the State of Tennessee, under contracts similar to that submitted to me in the agreement made by the Nashville and Chattanooga Railroad Company and the plaintiff, dated April 11th, 1872, and which I here refer to as a part hereof; and

4. These cars were operated under such contracts, during said years, as follows:

(*a.*) During the years 1887 and 1888, the plaintiff operated sleeping cars in the State of Tennessee as follows:

Each night a car left Nashville and went to Memphis, and on this car tickets were sold to passengers from Nashville to Memphis and not beyond. This car remained all day in Memphis, being cleaned there, and returned to Nashville the following night, going no further on a continuous trip. It remained in Nashville all day and was cleaned, and then, the following night, went from Nashville, Tennessee, via Chattanooga, to Atlanta, Georgia. It remained all day in Atlanta, was cleaned there, and then, the following night,

60 returned from Atlanta to Memphis.

On the trip from Memphis, tickets were sold from Nashville to Atlanta and to all intermediate points, including Chattanooga, and intermediate points within the State of Tennessee.

On the nights these cars left Nashville for Memphis and left Atlanta for Nashville, a car left Memphis for Nashville, and another left Nashville for Atlanta, selling tickets, as above set out, from Memphis to Nashville and intermediate points, and no further; and from Atlanta and intermediate points to Nashville and no further.

The car coming from Memphis to Nashville went on the trip to Atlanta before making a return trip to Memphis; and the car making the trip from Atlanta to Nashville went on the trip, the following night, to Memphis before making a return trip to Atlanta. The same cars were not used continuously in this service, but were changed, from time to time, by plaintiff, but, at all times, there were four cars of plaintiff performing this service, as above described.

During the year 1887, the East Tennessee, Virginia and Georgia Railroad Company ran two sleepers of its own, doing a business between Knoxville and Chattanooga, Tennessee.

(*b.*) In the years 1889, 1890, 1891, 1892, and 1893, the plaintiff has operated sleeping cars between Nashville and Memphis, selling tickets and carrying passengers from Nashville to Memphis and no further, on continuous trips, and from Memphis to Nashville, and no further, on continuous trips, and has operated sleeping cars between Atlanta, Georgia, and Nashville, Tennessee, on which it has carried some passengers from Chattanooga and intermediate points, within the State of Tennessee, to Nashville and no further, on continuous trips, all as set out in paragraph (*a*) of this finding.

During this time, the cars have been changed from time to time, at the will of the company, and alternate trips have been made to Memphis and to Atlanta, by the respective cars, before returning to the initial point.

(*c.*) From 1887, to the present time, on the lines of the Nashville, Chattanooga and St. Louis railway, and of the Louisville and Nashville railroad, and of the East Tennessee, Virginia and Georgia railway, now the Southern railway, the Newport News and Mississippi Valley railroad and the Illinois Central railroad, the Cincinnati Southern railway, and on all other railways within the State, whereon sleeping cars are operated, plaintiff has, upon its "sleepers" for compensation, taken up and carried, and put down, within the State,
61 passengers. Such cars have all been operated under contracts between plaintiff and the several railway companies the same as the contract attached to the deposition of R. Dean, so far as the issues in these causes are concerned.

(*d.*) Plaintiff has, from during 1887, to the present time, had agents in Nashville, Chattanooga, and Memphis, charged with the duties stated in the deposition of R. Dean, stipulated to be read in these causes

5. The sleeping cars were operated during a portion of the year 1887 between Nashville and Memphis, Tennessee, which during that time, though used constantly between said points, did not pass beyond the limits of Tennessee. It was agreed that, without either party waiving any right the plaintiff's claim in No. 2867 should be ab-ted $1234.00, and

6. The gross receipts of the plaintiff per year, from lines running into the State of Tennessee, was about five hundred thousand dollars per annum. The gross receipts from passengers "carried locally in Tennessee, on any of those lines" was about twenty-five thousand dollars per year, and

7. The cars actually used on all these lines during any and every year, more or less, during such year would number over one hundred.

8. The defendant, as comptroller aforesaid, demanded of the plaintiff payment of taxes under the revenue laws of the State of Tennessee for the years 1887, 1888, 1889, 1890, 1891, as follows:

Two cars, Nashville to Memphis, 1887	$1000.00
Interest to date	264.16
Same for 1888	1000.00
Interest to date	204.16
April 8, 1889, to April 8, 1890, one year	3000.00
Interest	428.50
April 8, 1890, to April 8, 1891	3000.00
Interest	248.50
April 8, 1891, to April 8, 1892	3000.00
Interest	68.50
Two cars Nashville & Chattanooga, 1887	1000.00
Interest	264.16
Same for 1888	1000.00
Interest	204.16
One other car equivalent, on business done on all interstate cars, 1887	500.00
Interest	132.08
Same for 1888	500.00
Interest	102.08
Total	$15916.30

62 Also for the year 1892 the sum of $3000.00, and

9. On the 28th day of August, 1891, the plaintiff paid to the defendant, as comptroller, the said sum of $15,916.30; and, on the third day, of May, 1892, it paid to him said other sum of $3,000.00. These sums were paid as taxes demanded by said comptroller, and paid under due and formal protest.

10. The plaintiffs brought these suits to recover the amounts paid, as follows:

Suit No. 2866, on the 22nd day of September, 1891, to recover $9,745.50, (a part of said sum of $15,916.30), said taxes and interest paid for certain years; and suit No. 2867, on the same day to recover the remainder of said sum of $15,916.30, taxes paid for certain other years; and suit No. 2903, within thirty days and on the — day of May, 1892, to recover said sum of $3,000.00, tax paid for the year 1892, or until April, 1893; and

11. That if the plaintiff is entitled to recover at all, it is entitled to recover said amounts sued for as above stated, less the sum of $1234.00, to be deducted from the claim made in case No. 2867; and accordingly,

Upon these facts, I direct judgments to be entered for the plaintiff, as of March 1st, 1902, as follows:

In case No. 2866 for	$15,888.40
In case No. 2867 for	6,036.27
In case No. 2903 for	4,768.50

For the reasons stated in the opinion this day filed.

C. D. CLARK, *Judge, etc.*

Filed March 10, 1902.

H. M. DOAK, *Clerk.*

And the court thereupon delivered the following opinion (in accordance with which the judgments were rendered), viz:

63 In the Circuit Court of the United States for the Middle District of Tennessee.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } Nos. 2866, 2867, 2903.

In these cau*d*es I find the facts to be as stated in the annexed finding of facts. I do not deem it necessary to do more than state in the briefest way possible my conclusions, as these will be readily understood by counsel interested and as the cases are of a character, that makes it certain the judgments will go up for review, this circumstance renders it less necessary that I should write out in full the method of reasoning upon the cases.

It is conceded by the defendant's eminent counsel that, if the acts of the General Assembly of the State must be construed as applying to interstate commerce, they are invalid. The contention on behalf of the defendant in this respect is that, while the revenue acts in question are very general and comprehensive in their terms, they are, nevertheless, susceptible of such interpretation as will make them apply alone to business done exclusively within the limits of Tennessee; and that, the acts as thus construed, are valid. When these cases are properly distinguished from others in their facts and limited accordingly, the only case which can be found supporting this view is that of Osborne *vs.* Florida, 164 U. S., 650; and this case is the one chiefly relied on by defendant's able counsel.

It will appear from what is thus said that the leading question involved here is that of the proper construction and application of the revenue statutes of the State. The language of the act of 1887, so far as it affects the question now considered, declares the privilege tax as follows:

"Sleeping car companies. Each company doing business in the State, on each car, per annum, $500,*000*.00."

The language of this statute is undistinguishable from the revenue act of 1887, section 6, except that the privilege tax imposed by the latter act was $50.00 per annum on every sleeping car, or coach, while the privilege tax under the act now in question is $500.00 on each car per annum. The act of 1887, section 6, was under consideration by Chancellor Cooper in 3 Tenn. Chancery, 587, and was construed as applying to interstate commerce and was held to be valid and the learned chancellor's judgment was affirmed upon ap

peal to the supreme court of the State, that court apparently
64 accepting not only his conclusions but the reasoning by which those conclusions were reached.

In Pickard *vs.* Pullman Southern Car Company, 117 U. S. 34, the Supreme Court of the United States, on writ of error to the circuit court of the United States for the middle district of Tennessee, reached a different conclusion and decided the question otherwise; and, in the closing paragraph of the opinion, said:

"The question involved in this case was before the court of chan-
"cery of Tennessee in Pullman Southern Car Company *vs.* Gaines,
"3 Tenn. Chancery, 587, on the same facts, as to the privilege tax
"for 1887. That court held (and it is stated that the supreme court
"of Tennessee, on appeal, affirmed its ruling), that this privilege tax,
"as to such of the cars as passed and repassed through the State, and
"did not abide in it, was not amenable to the objection that it inter-
"fered with interstate commerce. The view taken was that the
"property of the foreign corporation, used in Tennessee, could be
"taxed as property, or by an excise on its use; and that the tax
"in this case was not directly on the object of commerce or
"directly aimed at commerce. We have given to the views set
forth by the Tennessee chancery court the consideration due to the judgments of that tribunal, but are unable to concur in its conclu-
"sion."

It must therefore be regarded as a proper construction of these revenue acts, the language of which has just been quoted, that they do apply to interstate commerce, and this construction is the one adopted both by the State supreme court, in the Gaines case, following Chancellor Cooper, and by the Supreme Court of the United States in the Pickard case. The supreme court of the State decided that the act, construed as applicable to interstate commerce, was valid, while the Supreme Court of the United States held that the statute as thus construed was invalid, and it was only in regard to the validity of the statute that the views of the two courts were divergent.

While the act of 1887 is so general in its terms that it is manifestly applicable to cars engaged interstate, as well as those engaged in local or intrastate transportation, it is quite apparent that the question whether the act as applied to any local business limited to the State of Tennessee would be valid was not considered or passed upon by the other court and for the very sufficient reason that this phase of the question was not involved or presented.

If two of the sleeping cars of the plaintiff company were, in fact, operating on the local run between Nashville and Memphis, so that,
in fact, they were not engaged in interstate commerce, or in
65 making interstate runs or trips, the question was left open or untouched by these cases, whether or not the revenue act might not be valid in part, and invalid in part in its application to the actual conditions of the plaintiff company's business. This is so, because the obvious interpretation of the act of 1887, like that of 1877, is that it applied to all of the cars of the plaintiff company operating in Tennessee, whether engaged in intrastate or local business, or inter-

state commerce, and it could not be said that they applied to the one exclusively and not to the other. I think it is manifestly a sound rule that, if the plaintiff company had two cars engaged in local work, making trips between Nashville and Memphis and not going beyond the limits of the State, in making a complete run or trip, that the revenue act would be valid, as applied to such cars, and to that extent, and invalid only as applied to cars engaged in an interstate run, or in interstate business. It is conceded, or rather is not denied, that the plaintiff company, in fact, had two cars engaged on a local run between Nashville and Memphis, the trip beginning at Nashville and ending there, during a part of the year 1887. And I conclude from a study of paragraphs 1 and 2 of the written stipulation filed, together with the record of the case, that two cars were, in like manner, run during the year 1888, although counsel for the plaintiff contends that the facts were otherwise during the year 1888, and this contention is apparently conceded, or not denied by defendant's counsel.

It is not disclosed by the record that any change was made in the methods of the plaintiff's business during the year 1898, and no reason for any change in fact has been suggested in argument and probably none could be. It is quite evident that the situation, as a matter of fact, continued during the year 1888, just as it had during the year 1887, the business of both years being under a contract with the Nashville, Chattanooga and St. Louis railway, having its headquarters at Nashville, Tennessee. The fact that plaintiff company might undertake to call the trip one beginning at Memphis, or to formally declare the trip as beginning there, could not possibly change the fact that it did not begin there; but, on the contrary, that the initial or starting point was Nashville and that the trip from Nashville to Memphis and return ended at Nashville. The real substance of the thing cannot be sacrificed to a mere form or a mere formal declaration.

Under this view of the actual facts of the case and the precise method in which the plaintiff's cars run, my opinion is that
66 the revenue act of 1887 was valid as to the two cars of the plaintiff operating between Nashville and Memphis. I have no concern whether or not the privilege tax of $500.00 on a single car was excessive. That is a legislative question and if the plaintiff company did not choose to pay this tax it was under no obligation, as a matter of law, to do a local business in this State, or to run any cars exclusively between Nashville and Memphis. It could, therefore, easily avoid the tax by doing business in such method that the statute could not validly apply, as it was only necessary for it, in point of fact, and not merely in form, to adopt the method of *of* an interstate trip or run to avoid the application of the statute.

The act of 1887, so far as it applies to any cars beyond the two just mentioned, as doing a local business between Nashville and Memphis, was unconstitutional and invalid, and the plaintiff in the first case, with which I am dealing, No. 2867, is entitled to recover the amount paid under protest and now sued for, with interest from the time of payment, less a credit for the tax on two cars during the

years 1887 and 1888. The cost of the cause, of course, will follow the result and the actual amount recovered can be readily computed by counsel.

I now come to the acts of 1889 and 1891, under which the other taxes paid under protest and now sued for were collected. The revenue act of 1891 is identical with that of 1889, the language of which imposing the tax is as follows:

"Sleeping car companies. (In lieu of all other taxes, except ad "valorem tax.) Each company doing business in this State, for one "or more passengers taken up at one point in this State, and deliv- "ered at *at* another point in this State, and transported wholly within "this State, per annum $3,000.00."

Now, in regard to this statute, I will only say, by way of general observations, that the settled construction of the acts of 1877 and 1887 must be regarded as necessarily applicable to this act. Besides the course of construction adopted by the supreme court of the State and the Supreme Court of the United States, Judges Key and Jackson, upon full consideration, have construed this particular act as applicable to interstate commerce and adjudged it invalid and it will be admitted, I think, that I should accept that interpretation in the absence of a contrary exposition by the Supreme Court of the United States, or the circuit court of appeals for this circuit. I think it requires only a careful study and a reasonably close analysis
67 of the act *act* of 1889 to make it perfectly apparent that the act has no application to any local business in the sense in which it could validly apply at all. It will be noted that the privilege tax was not placed on each car, or upon the cars operated at all, but is a tax imposed on the company, the language being:

"Each company doing business in this State, for one or more passengers taken up at one point in this State, and delivered at another point in this State, and transported wholly within this State."

In view of the general situation of affairs, as then known to the legislature, it is clear that the purpose was to reach a company doing an interstate business and there is a manifest attempt to require it to pay a large privilege tax on the incidental business of taking up, while passing through the State, one or more passengers and transporting such passengers to another point within this State. To suppose that the General Assembly entertained the idea that taking up and putting down wholly within the State such passengers as it might secure for that limited transportation would justify so enormous a privilege tax as this, would be to impute to the General Assembly utter want of reason. Again, it is not, therefore, capable of separation, so as to say that any particular part of the tax may be applied to local business and the other part *of* to interstate business; and the statute does not adopt any method calculated to separate the two kinds of business. If the legislature designed to place so large a privilege tax as $3,000.00 on any local business done by taking or lodging one or more local passengers, wholly within the limits of the State, it manifested a willingness to do an injustice and to resort to oppression; but such a purpose as

this can never be imputed to the legislative body. On the contrary, it must be assumed that the legislature intended to act reasonably and justly.

If it had been the purpose of the legislature to impose this privilege tax on a local business and by reason of such business, as distinguished from general business, it is too plain for discussion, that it would have adopted language better calculated to express such a purpose and to give effect to the legislative intent.

On the contrary, the purpose is clearly disclosed to impose this privilege on each company and to avoid concern with the extent or amount of any particular kind of business.

If a through sleeping car should start on a trip from Chicago, Illinois, to Jacksonville, Florida, and each of the States through which it passes should impose a privilege tax of $3,000.00 on
68 the company for taking up and putting down a passenger in each State, it is too clear, looked at from any standpoint, that the company would be under the necessity of abandoning its business altogether and that there would be a direct and obvious interference with interstate commerce.

The statement in the act of the General Assembly that the privilege tax was imposed for transporting one or more passengers from one point to another wholly within the State, was, in view of the actual conditions present and the previous legislation and adjudications of the courts, manifestly an attempt, as Judge Key says, by mere formal declaration to avoid the objection of violating the Constitution.

In view of this, and other considerations, which I need not now refer to, I conclude that the revenue act of 1889 is unconstitutional and void. At the same time I regard the question as foreclosed by the settled interpretation of similar statutes adopted by the Supreme Court of the State and of the United States and particularly by the ruling of Judges Key and Jackson in regard to this very statute. I think their views should be accepted by me and followed, in the absence of a different ruling by the circuit court of appeals, the Supreme Court of the United States, or of the State of Tennessee, as to the proper construction of these acts; and I need not add that it is my duty to follow the Federal cases with regard to the validity or invalidity of the statutes, when construed as applicable to interstate commerce, which has been the interpretation put upon the statute by all of the courts thus far.

The case of Osborne *vs.* Florida is clearly distinguishable in its actual facts and conditions. The privilege tax in that case was on the local business done by an express company and this privilege tax was graded in amount, according to the size of the particular town or city in which the express company had an established office or agency and carried on its express business. In a city of large population, the privilege tax was larger than in a city or town of smaller population; and it is quite evident that the legislature of that State intended to make the amount of the privilege tax bear a relation to the local business done by the company. The legislature undertook to find out this relation or correspondence be-

tween the local business done and the tax by the size or population of the particular city and whether this was a successful method, or not, it nevertheless disclosed, upon the very face of the revenue act an i-tention only to tax the local business and to make the privilege tax on such local business correspond justly to the
69 amount of business actually done, as estimated by the population or size of the city where a local agency was established and it was not required to pay any privilege tax except in cities and towns where it established a local agency and this left the express company free to select such towns and cities as would afford a local business justifying an agency in view of the privilege tax imposed by the revenue act. It was under no compulsion, or necessity, to establish an agency and do an express business in any town or city whose population and the volume or amount of whose business did not justify the establishment of an agency there and the payment of the privilege tax, which was in proportion to the population of such city.

In the case at bar, there is, except as to the one or two local cars, during 1887 and 1888, no substantial ground whatever for saying that the privilege tax was based on any local business, or that it was in proportion to such local business, or that was or could be a burden on such local business only. On the contrary, it is quite plain that the burden necessarily fal-s on interstate commerce and that, in view of the then known conditions of the country, the legislature must be regarded as having intended not only the probable but the necessary consequences of its action.

And, in regard to the act of 1889, and the privilege taxes collected thereunder, it is evident that no local agency, local business, or local property was contemplated as a ground on which the privilege tax was imposed and the only reference whatever made to taking up and putting down a single passenger within the State was for the purpose of suggesting a ground of justification for the tax imposed. It was then well known, and is now well known, that the privilege tax of $3,000, on the company, placed a burden to that extent on interstate commerce; and that there was no local business which could bear such a burden, or upon which it could possibly fall. This is too plainly evident to be denied or to remain unacknowledged. The tax was imposed on the company and, if it be suggested that it is a charge or burden on the earnings of the company from local, as well as interstate commerce, this would not relieve the act of the objection made; and, moreover, the obvious answer would be that it was a burden on interstate commerce, as well as on any local business done; and the tax was not imposed in any proportion or relation to either business, but arbitrarily, upon the company and would, in the most favorable view to the defendant, operate as a burden upon both classes of business, in proportion to the amount of
70 each class of business, and, as a result, almost altogether upon interstate commerce.

Upon what is thus said, it is sufficient to announce that, in cases, 2866, and 2903, the plaintiff is entitled to recover the amount paid

under protest, with interest and costs, and judgment will go accordingly.

CLARK, *J.*

Filed November 29th, 1901.

H. M. DOAK, *Clerk.*

The defendant tenders this his bill of exceptions to the action of the court, in each of said cases, respectively, which is signed, sealed and ordered to be made part of the record.

C. D. CLARK, *Judge.*

71 The following stipulation was filed and entered of record, viz:

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903.

In these causes, it is stipulated that these three causes shall be heard together and a jury is expressly waived.

WM. L. GRANBERY,
Attorney for Plaintiff.
JOHN J. VERTREES,
Attorney for Defendant.

The following judgments were pronounced and entered in the respective causes, as of March 1st, 1902, viz:

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2966. Law.

On this day came on the above-entitled cause for hearing, and the parties having waived a jury in writing, the matter was submitted to the court, and, after hearing the testimony and argument of counsel, the court found the issues in favor of the plaintiff, and assessed the plaintiff's damage at the sum of nine thousand seven hundred and forty-five and $\frac{50}{100}$ dollars ($9,745.50) and the further sum of six thousand one hundred and forty-two and $\frac{90}{100}$ dollars, interest, making the total judgment $15,888.40 and the costs of this proceeding, for which let execution issue.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867. Law.

On this day, came on the above-entitled cause for hearing, and the parties having waived a jury in writing, the matter was submitted to the court, and, after hearing the testimony and argument of counsel, the court found the issues in favor of the plaintiff and assessed plaintiff's damage at the sum of three thousand seven hundred and two and $\frac{48}{100}$ ($3,702.48) dollars and the further sum
72 of two thousand three hundred and thirty-three ($2,333.79) dollars and seventy-nine cents interest, making the total judgment $6,036.27, and the costs of this proceeding, for which execution will issue.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903. Law.

On this day came on the above-entitled cause for hearing and the parties having waived a jury in writing, the matter was submitted to the court, and, after hearing the testimony and argument of counsel, the court found the issues in favor of the plaintiff and assessed plaintiff's damage at the sum of three thousand dollars ($3,000.00) and the further sum of one thousand seven hundred and sixty-eight and $\frac{50}{100}$ ($1,768.50) dollars interest, making the total judgment $4,768.50, and the costs of this proceeding, for which execution will issue.

73 PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903.

The defendant moved the court in each and every of these cases, respectively after the evidence was in, and before judgment, for judgment therein in his favor, which motion was refused, and to which action of the court the defendant excepted.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903.

The defendant moved the court in each and every of these causes for a new trial, but each and every of said motions was overruled; to which action of the court the defendant excepted.

74 The following is the memorandum from Judge Clark to the clerk, calling for certain data concerning the operation of cars, reference to which is made in statement of running of cars, pp. — to —, viz:

PULLMAN'S PALACE CAR COMPANY
vs.
W. J. ALLEN, Controller of the State of Tennessee. } Nos. 2866, 2867, 2903.

The second paragraph in the stipulation reads as follows:

"In the years 1889, 1890, 1891, 1892, and 1893, the plaintiff has operated sleeping cars between Nashville and Memphis, selling tickets and carrying passengers from Nashville to Memphis, and no further, on continuous trips, and from Memphis to Nashville, and no further, on continuous trips, and has operated sleeping cars between Atlanta, Georgia, and Nashville, Tennessee, on which it has carried some passengers from Chattanooga and intermediate points, within the State of Tennessee, to Nashville and no further, on continuous trips, all set out in paragrap- *paragraph* 1st of this stipulation. During this time the cars have been changed from time to time, at the will of the company, and alternate trips have been made to Memphis and Atlanta, by the respective cars before returning to the initial point."

This paragraph does not determine definitely whether, during the years 1889, 1890, 1891, and 1892 and 1893, the plaintiff operated two cars between Nashville and Memphis, as was its custom during the years 1887 and 1888. An examination of the proof fails to show that any change in fact was made in the mode of running these cars during the years 1889, 1890, 1891, 1892, and 1893, from what it had been during the years 1887 and 1888, except possibly, the sleeping car company simply declared that its trip commenced at Memphis, instead of at Nashville, as theretofore. In other words, the proof fails to suggest that any change was made, except the mere change in name, and it does not appear, as I read the proof, that there was any change in the condition, the mode of running the cars, or in the contract between the Pullman Company and the Nashville, Chattanooga and St. Louis railway.

I desire a statement from counsel on both sides, or a brief, as they may choose, on this question of fact, if it is a disputed one between them. I mean the question of fact, whether there was, in reality, any change in the run of the cars after 1888 from what had existed before. If paragraph 2 of the stipulation was intended to
75 definitely settle this proposition of fact, then I desire to know how the fact is as thus agreed upon. If not, I wish to have pointed out to me, what change was in fact made, so that Memphis was to be regarded as the initial point, or headquarters, after the year 1888, instead of Nashville, which had, confessedly, been the initial or starting point, theretofore, for the trip both to Memphis and to Atlanta. Of course it would amount to no change for the company simply to say that its trip commenced at Memphis after that time, instead of to Nashville, as theretofore, unless there was some change in the condition of the service, or the mode of operation, which furnished good ground for saying that the trip was different from what it had theretofore been.

The clerk will please ascertain, at once, an expression from counsel on this point alone, and send it to me at once.

Furthermore, the plaintiff concedes that it is not entitled to judgment for the tax on two cars for the year 1887. Now, what is to distinguish the case in this respect from the year 1888 and for subsequent years, unless it appears as a fact that, for those subsequent years, the run or trips of the cars can be regarded as commencing at Memphis as the initial point and running from there to Atlanta, a continuous trip, instead of treating Nashville as the starting point and headquarters for the four cars engaged in service over the line of the Nashville, Chattanooga and St. Louis railway. I must repeat that this inquiry is now *is* about a question of fact, and not one of law, and it is a question that was scarcely alluded to in the argument, and was, I think, treated as settled by the stipulation, but the stipulation, in view of its language above *e* set out, is not sufficiently specific in this respect.

CLARK, *J.*

76 The following, petition for a *s* writ of error was filed, viz:

PULLMAN'S PALACE CAR COMPANY
vs.
W. J. ALLEN, Comptroller of the State of Tennessee. } No. 2866.

PULLMAN'S PALACE CAR COMPANY
vs.
W. J. ALLEN, Comptroller of the State of Tennessee. } No. 2867.

PULLMAN'S PALACE CAR COMPANY
vs.
W. J. ALLEN, Comptroller of the State of Tennessee. } No. 2903.

And now comes J. W. Allen, comptroller of the State of Tennessee, defendant in these cases, respectively, and says that, on or about the first day of March, 1902, this court entered a judgment in said

three cases above named, respectively, in favor of the plaintiff and against this defendant, as follows: In case No. 2867 for $6,036.27; in case No. 2866, *d* for $15,888.40; and in case No. 2903, for $4,768.50. And that in the said proceedings and the proceedings had prior thereunto in said causes certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of *from the assignment of* errors which is filed with this petition. Wherefore this defendant prays that writ of error may issue in this behalf to the circuit court of the United States for the middle district of Tennessee for the correction of errors so complained of and that a transcript of the record, proceedings and papers in said causes (which by consent were heard together) duly authenticated, may be sent to the Supreme Court of the United States.

G. W. PICKLE,
Attorney General of Tennessee.
J. M. DICKINSON,
JOHN J. VERTREES,
Attorneys.

Writ of error allowed:
HORACE H. LURTON,
Circuit Judge.

The following assignment of errors was filed, viz:

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903.

At Law.

Assignment of Errors.

77 The defendant in these actions, which by stipulation, were tried together, in connection with his petition for a writ of error, in each and every thereof, makes the following assignment of errors in each and every case, which he avers occurred upon the trial of said causes, viz:

The court erred:—

1. In overruling the motion of the defendant for a new trial.

2. In entering judgment in favor of the plaintiff and against the defendant.

3. In holding and adjudging that the taxes imposed by the State of Tennessee upon the plaintiff and demanded of it, and paid by it under protest, and which the suits were brought to recover, applied

to and unduly affected the interstate commerce in which the plaintiff was engaged and were, for that reason, illegal and invalid.

5. In not holding and adjudging that the said taxes did not unduly affect or impose unauthorized burdens upon the interstate commerce in which the plaintiff was engaged.

G. W. PICKLE,
Attorney General of Tennessee.
J. M. DICKINSON,
JOHN J. VERTREES,
Attorneys for Defendant.

The following writ of error was issued, viz:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the middle district of Tennessee, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court before you, or some of you, in a suit between Pullman's Palace Car Company, plaintiff, and J. W. Allen, comptroller of the State of Tennessee, being three causes consolidated upon the hearing, viz, Nos. 2866, 2867, and 2903, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validit- or wherein was drawn in question the construction of a clause in the Constitution,
or of a treaty, or statute of, or commission held under
78 the United States, and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said J. W. Allen, comptroller, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 20th day of March in the year of our Lord one thousand nine hundred and two.

[Seal of U. S. Circuit Court.]

H. M. DOAK,
Clerk of the Circuit Court of the United States for the Middle District of Tennessee.

Allowed by:—
HORACE H. LURTON,
Judge of the Circuit Court of the United States for the Middle District of Tennessee.

The following citation was issued, viz:

United States Supreme Court, United States of America.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

To Pullman's Palace Car Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be held in the city of Washington, D. C., on the 20th day of April, 1902, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein J. W. Allen, comptroller of the State of Tennessee is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgments rendered against the plaintiff
79 in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of March, in the year of our Lord one thousand nine hundred and two and of the Independence of the United States the one hundred and twenty-sixth year.

HORACE H. LURTON,
Circuit Judge.

Endorsed.

I acknowledge service of the within citation, this 20th day of March, 1902.

W. L. GRANBERY,
Attorney for Plaintiff.

The following bond for appeal was executed and filed, viz:—

Know all men by these presents, that we, J. W. Allen, comptroller of the State of Tennessee, as principal and John J. Vertrees, as surety, are held and firmly bound unto Pullman's Palace Car Company, in the full and just sum of five hundred dollars, to be paid the said Pullman's Palace Car Company, certain attorneys, executors, administrators, or assigns, of successors; to which payment,

to and unduly affected the interstate commerce in which the plaintiff was engaged and were, for that reason, illegal and invalid.

5. In not holding and adjudging that the said taxes did not unduly affect or impose unauthorized burdens upon the interstate commerce in which the plaintiff was engaged.

G. W. PICKLE,
Attorney General of Tennessee.
J. M. DICKINSON,
JOHN J. VERTREES,
Attorneys for Defendant.

The following writ of error was issued, viz:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the middle district of Tennessee, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court before you, or some of you, in a suit between Pullman's Palace Car Company, plaintiff, and J. W. Allen, comptroller of the State of Tennessee, being three causes consolidated upon the hearing, viz, Nos. 2866, 2867, and 2903, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validit- or wherein was drawn in question the construction of a clause in the Constitution,
or of a treaty, or statute of, or commission held under
78 the United States, and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said J. W. Allen, comptroller, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 20th day of March in the year of our Lord one thousand nine hundred and two.

[Seal of U. S. Circuit Court.]

H. M. DOAK,
Clerk of the Circuit Court of the United States for the Middle District of Tennessee.

Allowed by:—
HORACE H. LURTON,
Judge of the Circuit Court of the United States for the Middle District of Tennessee.

The following citation was issued, viz:

United States Supreme Court, United States of America.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

To Pullman's Palace Car Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be held in the city of Washington, D. C., on the 20th day of April, 1902, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein J. W. Allen, comptroller of the State of Tennessee is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgments rendered against the plaintiff
79 in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of March, in the year of our Lord one thousand nine hundred and two and of the Independence of the United States the one hundred and twenty-sixth year.

HORACE H. LURTON,
Circuit Judge.

Endorsed.

I acknowledge service of the within citation, this 20th day of March, 1902.

W. L. GRANBERY,
Attorney for Plaintiff.

The following bond for appeal was executed and filed, viz:—

Know all men by these presents, that we, J. W. Allen, comptroller of the State of Tennessee, as principal and John J. Vertrees, as surety, are held and firmly bound unto Pullman's Palace Car Company, in the full and just sum of five hundred dollars, to be paid the said Pullman's Palace Car Company, certain attorneys, executors, administrators, or assigns, of successors; to which payment,

well and truly to be made, we bind ourselves, our, heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated, this 20th day of March, 1902.

Whereas, lately, at a circuit court of the United States for the middle district of Tennessee, in a suit depending in said court, between Pullman's Palace Car Company, plaintiff, and J. W. Allen, comptroller of the State of Tennessee, a judgment was rendered against the said J. W. Allen, comptroller, and the said J. W. Allen, comptroller, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit and a citation, directed to the said Pullman's Palace Car Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date thereof.

Now, the consideration of the above obligation is such, that, if the said J. W. Allen, comptroller, shall prosecute to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

J. W. ALLEN, *Comptroller.* [SEAL.]
JOHN J. VERTREES, *Surety.* [SEAL.]

Sealed and delivered in presence of:
H. M. DOAK, *Clerk.*

Approved.
HORACE H. LURTON, *Judge.*

80 The following entry, allowing a writ of error was made, viz:

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2866.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2867.

PULLMAN'S PALACE CAR COMPANY
vs.
J. W. ALLEN, Comptroller of the State of Tennessee. } No. 2903.

In the above-styled causes, comes the defendant, J. W. Allen, comptroller, etc., and prays a writ of error to the Supreme Court of the United States, to correct the judgments herein, as appears from his petition for writ of error, filed herein, and assignment of errors filed therewith. Upon consideration thereof, said writ of error is allowed upon defendant's executing bond in the sum of five hundred dollars conditioned as provided by law.

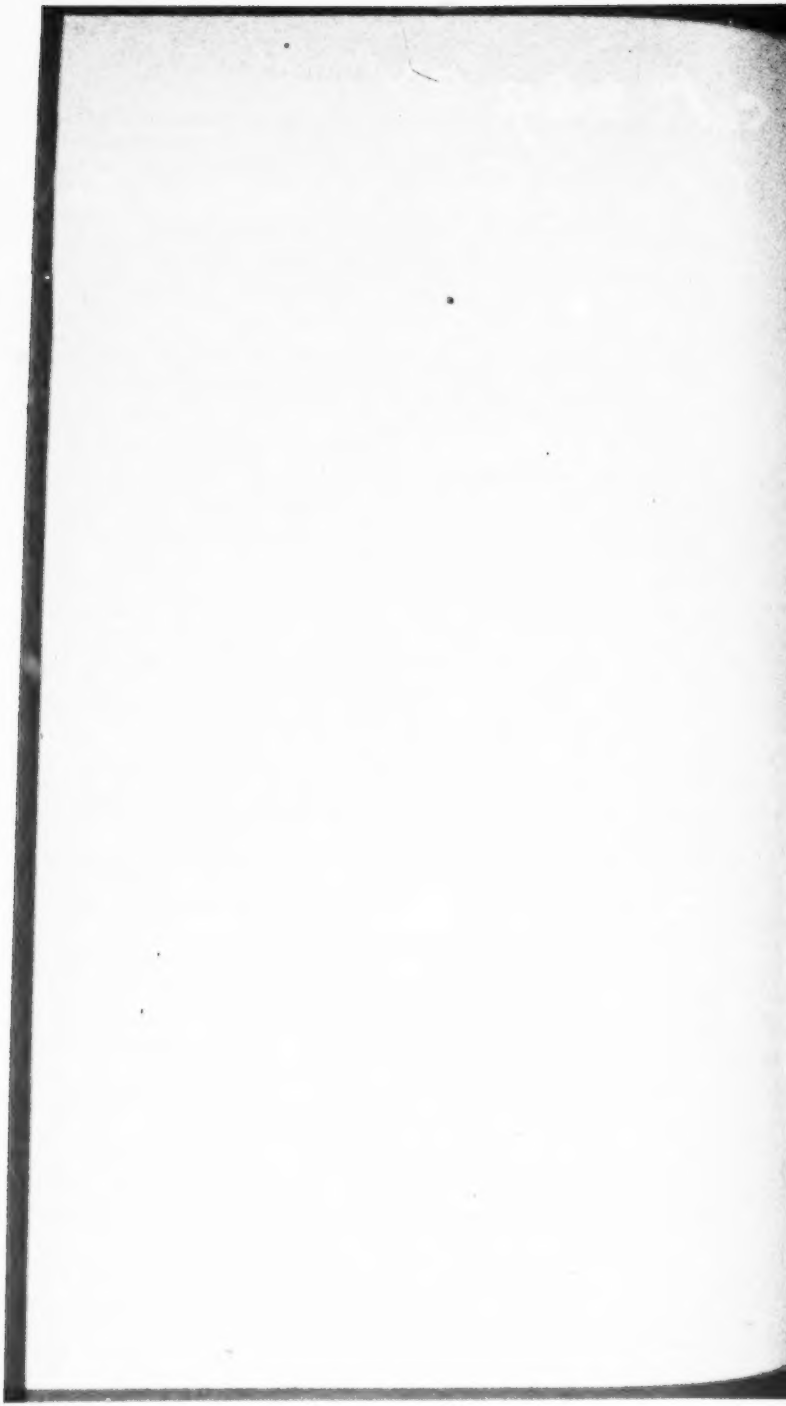
I, H. M. Doak, clerk of the circuit court of the United States for the middle district of Tennessee, hereby certify that the foregoing is a full, complete and perfect transcript of the record in the above-styled causes, as the same is on file or of record in my office.

In witness whereof I have hereunto signed my name and affixed the seal of the court. Gone at my office in Nashville, State and district above set out, this the 24th day of March, A. D. 1902.

[Seal Circuit Court U. S., Middle District Tenn.]

H. M. DOAK,
Clerk United States Circuit Court for the Middle District of Tennessee.

Endorsed on cover: File No. 18,472. M. Tennessee C. C. U. S. Term No. 619. J. W. Allen, comptroller of the State of Tennessee, plaintiff in error, *vs.* Pullman's Palace Car Company. Filed April 3rd, 1902.



No. 289, 27

Sup. of Cases vs. Pullman's Palace Car Co.

Office Supreme Court U. S.
FILED
OCT 25 1902
JAMES H. McKENNEY
Clerk.

Filed Oct. 25, 1902.

BRIEF

Supreme Court of the United States

OCTOBER TERM, 1901.

No. ~~612~~ 289

J. W. Allen, Comptroller of the State of Tennessee

vs.

Pullman's Palace Car Company.

Brief of

CHARLES T. CATES, JR.,
Attorney-General of Tennessee.

JOHN J. VERTREES,
Counsel for Plaintiff in Error.

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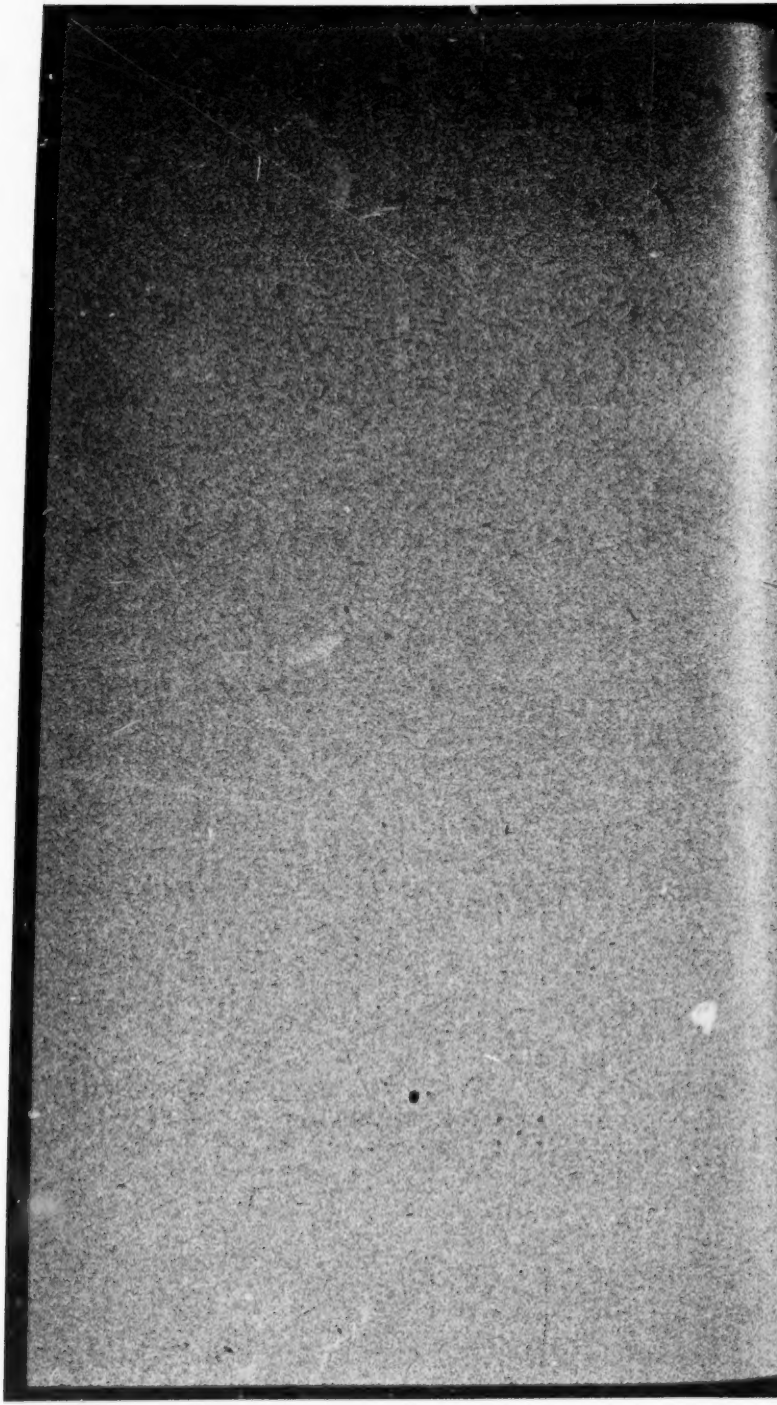

J. W. Allen, Comptroller, etc.,

vs.

Pullman's Palace Car Company.

May it please the Court:

This is a tax case. The question involved is whether certain privilege taxes, imposed by the State of Tennessee upon sleeping-car companies, were rightfully collected from the defendant in error.

The solution of the question depends upon the validity of two statutes enacted by the Legislature of Tennessee. If those statutes are not violative of the interstate commerce clause of the Constitution of the United States, the taxes were valid and ought to have been collected; but if they violate that clause, the taxes were wrongfully exacted. The Court below, the Circuit Court of the United States for the Middle District of Tennessee, held the statutes to be unconstitutional and void, and gave judgment accordingly for $26,695.17. The State of Tennes-

see, through its Comptroller, sued out a writ of error to reverse that judgment.

So much of the case as is necessary to be known, in order to determine the questions involved, is contained in the following

STATEMENT OF THE CASE.

The State of Tennessee enacted a general revenue law in the year 1887, which, among other things, provided that—

> Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum: . . .
>
> SLEEPING-CAR COMPANIES.
>
> Each company doing business in this State, on *each*[1] car per annum $500.00

By virtue of this statute, the Comptroller demanded and collected from the Pullman Palace Car Company (hereinafter called the "Pullman Company") the following taxes:

1887. 2 cars (Nashville to Memphis)	$1,000.00
1887. 1 car, proportionate business on interstate cars	500.00
1888. 2 cars (Nashville to Memphis)	1,000.00
Tax on five cars	$2,500.00
Interest, penalties, etc	$1,609.30

[1] All italics are ours.—*Counsel.*

In 1889 the Legislature of Tennessee enacted a new general revenue law, which, among other things, provided that—

> Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum: . . . .
>
> SLEEPING-CAR COMPANIES.
>
> Each company doing business in this state, for one or more passengers taken up at one point *in this state*, and delivered at another point *in this state*, and transported *wholly within this state*, per annum, $3,000.00.[1]

By virtue of this statute of 1889, the Comptroller demanded and collected from the Pullman Company the following taxes:

For 1889	$3,000.00
" 1890	3,000.00
" 1891	3,000.00
Total tax	$9,000.00
Interest, costs, penalties, etc	745.50

The large amount of interest, penalties, etc., is due to the fact that these taxes were not paid until 1891 and 1892.

The Pullman Company paid under protest, and instituted suits to recover, within the time prescribed by the

[1] 1889, ch. 130, sec. 5, p. 266. The Act of 1891 is identical with the Act of 1889, and, therefore, will not be reproduced here.

laws of Tennessee; and it is entitled to recover, *if* these statutes are unconstitutional and void.

The case, by agreement, was tried by the Court without a jury, and there is consequently a special finding of facts.

THE FACTS.

The Pullman Company owns and operates sleeping-cars over numerous railroads in the United States. It runs its cars over railroads in and traversing the State of Tennessee. The contracts between the Sleeping-car and the Railroad Companies, under which these cars are run in Tennessee, in substance provide:

> That the Sleeping-car Company shall furnish the "sleepers"; and keep the beds, carpets, etc., in order; and furnish porters and conductors; and give the railroad officers passes.
>
> That the Railroad Company, on its part, shall have the cars *free* of charge; and
>
> Pay to the Pullman Company *three cents per mile* for this privilege; and supply all the light and heat and ice water for the cars; and repair all damages due to accident and casualty, regardless of its own fault.[1]

The lines of railway in Tennessee over which the Pullman Company has sleeping-cars in use under this con-

[1] Trans., 22–26.

tract, are not limited to the boundaries of Tennessee. They are long lines, traversing many States, and are known as the—

Louisville & Nashville R. R. Company;
Nashville, Chattanooga & St. Louis Railway;
Southern Railway Company;
Illinois Central Railroad Company.

Sleeping-cars are run into, and out of, and across, Tennessee on these lines. Many passengers are "through" passengers; but it is also true that a number of passengers are "taken up and carried, and put down, *within* the State" of Tennessee.[1]

One branch of the company's operations, particularly, is to be mentioned. Every night a "sleeper" left Nashville, Tenn., for Memphis, Tenn. Having arrived at Memphis, it would *remain there a day*, during which it would be cleaned. That night it would return to Nashville, and there it would *remain a day*, during which it would be cleaned. The night of that day it would leave for Atlanta, Ga., by way of Chattanooga, Tenn. A similar return "run" would be made back to Nashville, and after a day, to Memphis, Tenn.[2]

---

[1] Trans., 51.

[2] Trans., 50.

"On the nights these cars left Nashville for Memphis, and left Atlanta for Nashville, a car left *Memphis* for *Nashville*, and another left Nashville for Atlanta, selling tickets as above set out from *Memphis* to *Nashville* and *intermediate* points, and *no further;* and from Atlanta and *intermediate*" (Chattanooga, Tullahoma, Murfreesboro, etc.), points, and no further.[1]

The annual gross receipts of the Sleeping-car Company from lines running into Tennessee were about $500,000, but the receipts from "local" passengers were about $25,000 a year.[2]

Over one hundred different cars were used during the year on all these lines in Tennessee.[3]

It was conceded that the tax for the year 1887 on the two cars run exclusively between Nashville and Memphis was lawfully demanded.[4]

From the foregoing statement it will be observed—

That the Pullman Company does both an interstate and an intra-state business, at the same time and with the same cars;

That is, on any given "run" there will be passengers of these various classes:

---

[1] Trans., 50.
[2] Trans., 51.
[3] Trans., 52.)
[4] Trans., 52.

a. Passengers taken up at points in Tennessee and transported to other points in Tennessee;

b. Passengers taken up in Tennessee and transported to points beyond Tennessee;

c. Passengers taken up outside of Tennessee and transported to points in Tennessee; and

d. Passengers transported *across* Tennessee.

a represents intra-state business, and which amounts to about..... $25,000.00

b, *c*, and *d* represent interstate business, which amounts to about..... 475,000.00

Upon the facts stated, the Court below was of the opinion that all the acts were unconstitutional, and the taxes collected thereunder void; and judgment was accordingly rendered in favor of the Pullman Company for $26,693.17.

ASSIGNMENT OF ERRORS.

The Court erred—

1. In entering judgment in favor of the plaintiff and against the defendant.

2. In holding and adjudging that the taxes imposed by the State of Tennessee upon the plaintiff and demanded of it, and paid by it under protest, and which the suits were brought to recover, applied to and unduly affected the

interstate commerce in which the plaintiff was engaged, and were, for that reason, illegal and invalid.

3. In not holding and adjudging that the said taxes did not unduly affect or impose unauthorized burdens upon the interstate commerce in which the plaintiff was engaged.[1]

4. In not holding and adjudging that the taxes imposed and collected by virtue of the Act of 1887 were valid.

5. In not holding and adjudging that the taxes imposed and collected by virtue of the Acts of 1889 and 1891 were valid.

ARGUMENT.

I.

The only question in the case is a constitutional one—whether certain acts of the Legislature of the State of Tennessee are in violation of Article 1, Section 8, Sub-section 3 (the interstate commerce clause), of the Constitution of the United States.

The statutes in question are—

Acts 1887, ch. 1, sec. 5;
Acts 1889, ch. 130, sec. 5;
Acts 1891, Ex. Sess., ch. 25, sec. 5.

The Acts of 1889 and 1891 are the same, and, therefore, one of them only will be quoted here. The Acts of

[1] Trans., 63.

1889 and of 1887 are different, and will require separate consideration.

The Act of 1889 will be first considered. This Act is the general revenue law of the State of Tennessee for that year, and it (as is also the Act of 1891) is as follows:

> Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum:
>
> . . . . . .
>
> SLEEPING-CAR COMPANIES.
>
> (In lieu of all other taxes except *ad valorem* tax). Each company doing business in this State, for one or more passengers taken up at one point *in this State*, and delivered at another point *in this State*, and transported *wholly within this State*, per annum, $3,000. (1889, ch. 130, sec. 6, p. 266.)

Our first proposition is, that:

II.

This Act of Tennessee of 1889 *is valid, and is not inimical to the interstate commerce clause of the Constitution of the United States.*

It will be observed that the Pullman Company did *both* an interstate and an intra-state business. "On all other railways within the State whereon sleeping-cars are operated, plaintiff (the *Pullman Company*) has, upon its

'sleepers', for compensation, *taken up*, and *carried*, and *put down*, *within* the State, passengers," is the finding of the Court as to the interstate business.[1]

It will also be observed that the Legislature of Tennessee has been exceedingly careful to impose the tax upon sleeping-car companies on the intra-state business alone, and *not* upon the interstate business done. "For one or more passengers taken up at one point in *this* State, and delivered at another point in *this* State, and transported *wholly* within *this* State," is the language of the Acts of 1889 and 1891.

Consequently the question to be determined, stated in general terms, is this: Where a sleeping-car company does *both* an interstate and an intra-state business, can a State tax the intra-state business? Or, stated otherwise: Does the fact that a sleeping-car company does an interstate business, as well as a local or intra-state business, deprive the States of the power to tax the local business?

The question presented by this case is far-reaching in its consequences. When the States were but little more than sparsely-settled agricultural communities, with slow and difficult means of inter-communication, the present question was one of comparatively little importance. But since it has come about that distance has been abridged

[1] Trans., 51.

by the railway, the telegraph, and the telephone, and the business relations of New York, and Nashville, Tennessee, become closer than those formerly existing between Nashville and Knoxville, in the same State; since it has come about that businesses are rapidly consolidating into concerns of great magnitude, the question now presented is one which must be considered from shifted points of view. Changing conditions have altered opinions, and to such an extent that this Court at a comparatively recent date has said that

> "With reference to the utterances of this Court until within a very short time past, as to what constitutes commerce among the several States, and also as to what enactments by the State Legislatures are in violation of the constitutional provision on that subject, it may be admitted that the Court has not always employed the same language, and that all of the judges of the Court who have written opinions for it may not have meant precisely the same thing." (*Fargo vs. Michigan, 121 U. S., 230–240.*)

It has more than once been declared that "the States cannot, by legislation, place *burdens* upon commerce with foreign nations, or among the several States;" but the question is, what is a "burden" in the prohibited sense?

The business of every one engaged in trade or commerce, so far as profits are concerned, must be considered

in its entirety—as a unit. That is to say: Although a trader or carrier does two kinds of business, and keeps his books so as to show the interstate and the intra-state business separately, nevertheless it is all one as to the result. If a burden be placed by Congress upon the interstate part of the business greater than it can bear, the intra-state business must bear its part of the load if the business is to continue. The burden must be lifted, the obligation paid, out of the joint receipts, before any *profit* can be declared. Upon the other hand, if such an onerous burden be imposed by a State upon the intra-state business, the interstate business must help to bear it if the business is to continue. And if a burden be placed upon *either*, though under the forms of law it be leveled at, and imposed, upon *one* only, nevertheless if it be greater than both together can profitably bear, the *business itself* must fail. In the nature of things the *business* is a unit so far as the *owner* is concerned; and that which is a "burden" upon any branch is a burden upon the whole.

In this connection, two well settled principles are to be noted. The first is, that *if* the State of Tennessee is possessed of the power to impose this privilege tax, the *amount* of the tax is a question for the Legislature of Tennessee alone to decide. The only concern of this

Court is with the validity of the tax. All else lies beyond the jurisdiction which it has.

Delaware R. R. Tax, 18 Wall, 231;
Cal. & Pac. R. R. Co., 127 U. S., 141;
Home Ins. Co. vs. New York, 134 U. S., 594;
Weston vs. Charleston, 2 Pet., 449, 466;
State Tax on Foreign-held Bonds, 15 Wall, 300, 319;
Kirtland vs. Hotchkiss, 100 U. S., 499;
Street R. R. Co. vs. Morrow, 87 Tenn., 432;
Railroad vs. Harris, 99 Tenn., 684, 709;
Jenkins vs. Ewin, 8 Heisk., 477.

The other rule to be remarked upon in this connection is, that the motives of Legislatures, and the policy, or impolicy of statutes, are things with which Courts have nothing to do.

Fletcher vs. Peck, 6 Cranch, 87;
Angle vs. Chicago, etc., R. R. Co., 151 U. S., 17;
Lynn vs. Polk, 8 Lea (Tenn.), 218, 233, 298.
Railroad vs. Harris, 99 Tenn., 708.

These rules have been adverted to for the reason that the Court below declared this tax to be "arbitrarily" imposed, without regard to the volume of the Company's business; and approved the expression of District Judge Key, in an earlier case, to the effect that the act is an attempt by mere "formal declaration" to avoid the objection of violating the Constitution.

We now recur to the principal question.

The tax assessed by this act is *not* imposed upon the interstate business. It is restricted to the intra-state business alone. It is not imposed upon any article of property used in business, but upon the business itself. It is not imposed upon the business as a whole, but upon a certain branch of the business.

If the Pullman Company did an intra-state business alone, the validity of this tax would not even be questioned. If the Company did an interstate business alone, the power of the State to tax that business could not be claimed. Now, as the Company does *both* kinds of business, and as the tax is upon one only, and upon that one which could undeniably be taxed if the Company did an intra-state business alone, it follows that one of two propositions must be true, namely:

First: That if *any part* or branch of the business carried on by any company or trader is interstate trade, *no* tax can be imposed by a State upon the other parts or branches of such business, even though they be of a local or intra-state character; or,

Second: If the business conducted by a company or trader be both interstate and intra-state in character, a State *has* the power to tax the local or intra-state branch, even though such tax be a "*burden*" upon the business,

and in that way *indirectly* a burden upon the interstate branch as well.

As already stated, traders, and companies who can command large capital, can, in these times, conduct an extensive interstate business with greater facility than a limited local business could formerly be carried on; and if it be that a branch of interstate business will protect the whole from State taxation, it will be easy for the man of large capital to establish branches in numerous States to capture the local business—adding a limited interstate branch so as to shield the whole from local taxation.

Again: The local business man can add a small branch of interstate business as an attachment, to enable him to exempt his business as a whole; and thus both classes of traders can elude privilege taxation of their business.

Upon the other hand, if it be held that a privilege tax imposed by a State, upon the *local* branch of a trader's or company's business, is a valid exercise of the taxing power, even though *indirectly* it be a "burden" upon interstate commerce, no harmful results can follow either to the State or the traders, so long as the "burden" is not so harmful as to become an *interference*.

The States protect the business and property of all those engaged in interstate commerce. Their courts are constantly occupied, at great expense, in redressing the

grievances of which they complain. The officers of the criminal law, paid by the State, are largely occupied in pursuing evil-doers, whose most pernicious activity is against the rights and property of the great transportation agencies of commerce. It would seem that the States ought to possess the power of taxation, and ought to be allowed to exercise it, so long as it does not *interfere* with interstate commerce.

Undeniably it is impossible to draw the undefinable line between the power of the State and the prohibition of the Constitution; but while the exact line of demarkation cannot be distinguished, the region wherein it lies can be located between general lines according to the following rule:

A tax may be imposed by the States upon the local or intra-state branch of a trader's or company's business, which is of both an interstate and an intra-state character, so long as it is *restricted* to the intra-state business, and does not amount to a regulation of the whole.

It is permissible for the States to tax personal *property* employed in interstate commerce like other property within its jurisdiction.[1] Such a tax is a "burden" upon the interstate commerce in which the cars are used, but it

[1] Pullman Car Co. *v.* Penna. 141 U. S., 18, 23; Am. Ref. Transit Co. *v.* Hall, 174 U. S., 70.

is not *such* a burden as to so interfere that it amounts to regulation.

It is permissible for the States to tax the *franchises* of a corporation engaged in interstate commerce.[1] Such a tax is a "burden," but it is not such a burden as to amount to a regulation of interstate commerce.

The tax now in question was not imposed upon either the property or the franchises of the Pullman Company. It was imposed upon business—upon a part of the company's business. Is a tax upon that *part* of the business only which is local forbidden?

The case of *Leloup vs. Port of Mobile* (127 U. S., 640) was decided on the 14th day of May, 1888. It appears that the municipal corporation known as the Port of Mobile, in the State of Alabama, passed an ordinance to the effect that the license tax for the fiscal year should be fixed as follows: "On Telegraph Companies, $225." The Western Union Telegraph Company was a foreign corporation doing both an interstate and an intra-state telegraph business in the city of Mobile. It refused to pay the tax upon the ground that such tax was a regulation of interstate commerce, and therefore void. In this contention,

[1] Mass *v.* West. U. Tel. Co., 141 U. S., 40 (1890).

the company was sustained. The Court, through Mr. Justice Bradley, said:

> The question is squarely presented to us, therefore, whether a State, as a *condition* of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages, from one State to another, and between the United States and foreign countries. . . . Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can be done, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. (127 *U. S.*, 645.)

But the Court also said:

> "It is urged that a *portion* of the telegraph business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the *internal business*, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the *entire* operations of the Company." (127 *U. S.*, 647.)

Here was a plain intimation that if the tax had been restricted to the internal business of the telegraph company alone, it would have been sustained. This intimation is

developed into an enunciation in *Ratterman* v. *West. Union Telegraph Company* (127 U. S., 411), decided the same day upon which was decided *Leloup* v. *Port of Mobile*. In *Ratterman vs. West. Union Tel. Company* it appeared that the State of Ohio imposed a tax upon telegraph companies according to the amount of their gross receipts. The Western Union Telegraph Company filed a report in accordance with a requirement of the statute (but under protest), showing that its gross receipts in Ohio were $175,214.88, divided as follows: from interstate business, $142,158.18, and from intra-state business, $32,056.70. The Ohio *statute* did *not* make any distinction between the two kinds of business. It imposed a single tax upon the gross receipts. The Court held the tax to be valid as to the receipts from the intra-state business, and void as to those from interstate business.

Among other things the Court said:

> "Neither are we of opinion that there is any real question, under the decisions of this Court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that so far as it was only upon commerce wholly within the State it was valid."

And the Court cited with approval the case of *The State Freight Tax*, 15 Wall., 232, for the proposition that—

> "Where the subjects of taxation can be separated, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the Court will act upon this distinction, and will restrain the tax on interstate commerce, while permitting the State to collect that arising upon commerce wholly within its own territory."

And in conclusion the Court said:

> "We answer the question, in regard to which the judges of the Circuit Court divided in opinion, by saying that a *single* tax assessed under the Revised Statutes of Ohio, upon the *receipts* of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed *in gross* and without separation or apportionment, is *not* wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce." (*Pp. 427-8.*)

Next is the case of *Western Union Tel. Co.* vs. *Alabama*, 132 U. S., 472 (1889). In this case it appeared that a law of the State of Alabama imposed a tax on the gross receipts of every telegraph company derived from "business done in this State." It required reports to be made to the Assessors, showing the amount of such

receipts. The Company made a report, showing its gross receipts from business done *wholly* within the State of Alabama. The Board of Assessors required it to make an additional report, showing all receipts from all messages, whether carried wholly or partly within the State; and assessed the Company for taxation upon this latter amount.

The Supreme Court of Alabama construed the statute to be as the Assessors construed it, and sustained the tax. Nevertheless this Court, while reversing the case, and holding the tax to be void as to the interstate messages, held it to be valid as to the messages included in the first return, and remanded the case to be proceeded with accordingly.

Pacific Express Company vs. Seibert, 142 U. S., 339 (1892), was a case involving a tax imposed upon express companies by the State of Missouri. The statute imposed the tax upon the receipts from "the business done within the State." The Circuit Court held that this statute did not interfere with the Company's interstate business, and that if it were otherwise, inasmuch as the receipts *could be separated*, the tax would be good as to all business done wholly within the State.[1] The judgment was affirmed on appeal. This Court held that the statute, properly construed, should be restricted to intra-state business, and that the tax consequently was valid.

[1] 44 Fed. Rep., 310 (1890.)

In *Osborne vs. Florida*, 164 U. S., 650 (1896), it appeared that a statute enacted by the State of Florida imposed a license tax on all express companies "doing business in this State." As will be observed, it was imposed on *all* companies, without regard, so far as the *expressed* terms of the statute are concerned, to the nature of the business done; without regard to its local or its interstate quality. But under well settled rules of interpretation the Supreme Court of Florida *construed* the statute to relate to local business alone. That construction was, of course, accepted by this Court, and (being accepted) the tax was sustained. And Mr. Justice Peckham said:

> "In other words, this statute as construed by the Supreme Court of Florida does *not* exempt the express company from taxation upon its business which is *solely* within the State, *even though* at the same time the company may do a business which is interstate in its character, and that as to the latter kind of business, the statute does not apply to or affect it.
>
> "As thus construed, we have no doubt as to the correctness of the decision that the Act does not in any manner violate the Federal Constitution." (164 *U. S.*, 654.)

Also:

> "It (*the company*) can conduct its interstate business without paying the slightest heed to the Act

because it does not apply to, or in any degree affect, the company in regard to that portion of its business which it has the right to conduct without regulation from the State.

"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is, therefore, valid."

POSTAL TELEGRAPH-CABLE COMPANY VS. CHARLESTON.
152 U. S., 692 (1893).

This case also presented the direct question.

The telegraph company was a corporation of the State of New York, with an office in Charleston, South Carolina. It also had numerous offices throughout South Carolina and in other States.

The city of Charleston imposed a privilege tax of $500 per annum on every telegraph company or agency "*for business done exclusively within Charleston.*"

This Court sustained the tax, holding that it was not a regulation of interstate commerce.

The cases of *Western Union Telegraph Company vs. Massachusetts*, 125 U. S., 530; *Leloup vs. Port of Mobile*, 127 U. S., 640; *Telegraph Company vs. Texas*, 105 U. S., 460; *Ratterman vs. Western Union Telegraph Company*, 127 U. S., 411; *Western Union Telegraph Company vs. Alabama*, 132 U. S., 472, and *Pacific Ex-*

press Company vs. Seibert, 142 U. S., 339, were cited by the Court, and the conclusion announced that they needed "no reinforcement," and that "their conclusions are readily applied to the case in hand."

These, we respectfully submit, are conclusive of the question.

Independently of the case of *Postal Telegraph-Cable Company vs. Charleston*, 153 U. S., 692, a number of the State Supreme Courts have arrived at the same conclusion.

TENNESSEE—Railroad vs. Harris, 99 Tenn., 685, 710.

FLORIDA—Osborne vs. State, 33 Fla., 162; s. c., 25 L. R. A., 120; 39 Am. St. Rep., 99.

NORTH CAROLINA—State vs. French, 109 N. C., 722; s. c., 26 Am. St. Rep., 590.

NEW JERSEY—New Jersey vs. Board, 55 N. J. Law, 529; s. c., 25 L. R. A., 134.

NEBRASKA—W. U. Tel. Co. vs. Fremont, 43 Neb., 500; s. c., 26 L. R. A., 706; York City vs. Chicago, etc., R. R., 56 Neb., 578.

UTAH—Ogden City vs. Utah, 17 Utah, 76.

VIRGINIA—W. U. Tel. Co. v. Bright, 90 Va., 70.

ALABAMA—Ala., etc., R. R. vs. Bessemer, 113 Ala., 668.

OHIO—Express Co. vs. State, 55 Ohio St., 69.

The reason is, that a tax upon that part or branch of the business, or the receipts from a business which is

intra-state, is *not* a regulation of interstate commerce; neither does it so *hamper* or *interfere* with interstate commerce as to "amount" to regulation.

When this Court held that a State tax upon personal property used in interstate commerce was not forbidden as a regulation of interstate commerce, and that a State tax on the franchises of a company engaged in interstate commerce was not forbidden, it was obliged to follow that a State tax upon the receipts from local business, or upon that part of the business which is local, could not be regarded as a "regulation" of interstate commerce.

This doctrine was announced because, logically, a privilege tax imposed by a State upon business done wholly within its limits is *not* in fact a regulation of such interstate business as the taxpayer happens to be doing at the same time. The one thing is not the other. Neither is the "burden" so *direct*, or the interference so serious, as to justify the declaration that in effect it "amounts to regulation."

Moreover, public considerations, which are ever to be regarded, do not commend such an interpretation. Upon the contrary, the *protection* required by these companies, and actually afforded by the States, demands that they should bear their just proportion of the expense incurred in so doing.

This has been more than once expressed by this Court.

"Usually such corporations"—

Says Mr. Justice Shiras—

"Though organized under the law of one State, make their profits by doing their business in several, or all, of the States, and while so doing receive the *protection* of their laws. When the tax payers of one State perceive that they are subjected to competition by the importation of articles made in another, or that they are contributing continually to the prosperity of foreign corporations, what more natural than that they should demand that some share of the public burdens should be put upon such corporations? The difficult task of the law-maker is to meet that *natural* and *proper* demand without infringing upon the freedom of interstate commerce, or depriving those engaged therein of the equal protection of the laws." (*Am. Ref. Tr. Co. vs. Hall*, 174 *U. S.* 75.)

"Corporations and companies engaged in interstate commerce"—

Said the Chief Justice in *Adams Ex. Co. vs. Ohio*—

"Should bear their proper proportion of the burdens of the governments under whose *protection* they conduct their operations, and taxation on property collectible by the ordinary means does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of the government." (165 *U. S.*, 221 (1876.)

The result of the cases is stated by Prentice and Eagan in their treatise, entitled "Commerce Clause of the Federal Constitution,"[1] in these words:

> "The imposition of heavy taxation upon domestic commerce may, of course, increase the expense of interstate transportation. Carriers are generally compelled to have their agencies and officers, and to maintain property within the State through which they operate, whether the business conducted be interstate, or intra-state and domestic. If, as a result of State legislation, their operation be confined to interstate transportation, their business will be burdened with an expense which would otherwise be divided between the two classes. *No case can be found, however*, in which State regulation or taxation of purely domestic commerce has been declared invalid for that reason."

While taxes are said to be imposed upon a man's property or business, or a company's property or franchises or business, they are, after all, imposed upon the tax payers personally. This tax, now in question, was imposed upon the *Company*, but for, and because of, a certain business.

It is obvious that one of two things must be true: (1) It must be true that *no* tax can be imposed by a State upon local business where the person from whom

[1] Page 236.

the tax is demanded happens to do interstate business at the same time; (2) or such a tax *can* be imposed without violating the Constitution of the United States. If the former be true, States, and the citizens of the respective States, must give such person business opportunity and protection, *free* of any tax or charge.

Such appears to have been the view taken of this case by the Court below.

The other view is that which we understand this Court to have announced, and which sustains the validity of the tax now in question, imposed upon the Pullman Company by the State of Tennessee.

The Court below appears to have been controlled by two opinions announced a long time ago by the Circuit and the District Courts of Tennessee. Those cases will now be briefly considered.

United States Express Co. vs. Allen, Comptroller, 39 Fed. Rep., 712, is the first. It was decided by District Judge Key in 1889.

The general revenue law of Tennessee of 1889, already referred to, imposed a tax on express companies upon their local business alone. The provision with respect to express companies is in effect the same as that relating to Sleeping-car Companies. The tax is expressly restricted

to intra-state business. "For one or more packages taken up at one point in this State and transported to another point in this State," is the language of the Act.

The United States Express Company filed a bill in equity to enjoin the collection of this tax, on the ground that it was void as a regulation of interstate commerce. Judge Key held that it was void, and ordered the injunction to issue. His logic, in substance, is this:

> That the tax bears as "heavily" on the *Company* as if it were imposed upon all its business, for the reason that if it were to cease to do a local business the interstate business would be burdened with fixed charges which otherwise would be divided between the two classes of business; that "perhaps" this does not render the tax invalid, but that, after all, the provision is a mere "device to fasten the tax upon the Company;" that the tax is not regulated by the amount of the business, but by the length of the line, which cannot be the standard.

That which the learned judge urges as a fatal objection to the tax, could with equal propriety be urged against *any* tax which can be imposed, and, being so broad, ceases to be a valid objection at all.

For, after all, every tax law is a "device" to fasten the tax upon the taxpayer. A tax upon the *property* of a corporation must be borne by the company; and if a

tax be imposed upon one branch of any business of a company with fixed charges, and that branch be discontinued, the other branch will then have to bear the whole expense thereafter.

Privilege taxes *ought* probably to be regulated by the amount of business, but they do not have to be so regulated. The Legislature, if it has power to impose a privilege tax at all, can fix the amount at discretion, unless, indeed, it be confiscatory, of which something will be said later on.

We respectfully submit that the opinion is not entitled to weight, for the reason that it antedates the opinions of this Court, and is inconsistent with them, and is not logically exact.

The case was brought to this Court, and here reversed; but it was reversed upon the ground that no case was shown for *equitable* relief. The merits of the question were not considered.[1]

The opinion of Judge Jackson, referred to by Judge Clark, presumably is the opinion rendered by him in *Pickard vs. Pullman Palace Car Company*, which was removed to this Court, and the opinion in which, delivered by this Court, is reported in 117 U. S., 34.

[1] 139 U. S., 591, 658.

The case was this: Tennessee passed an Act declaring "the running and using of sleeping cars" on railroads in Tennessee to be a *privilege*, and imposing a tax of $50.00 upon every car so run and used, and making it unlawful to run a sleeping-car without paying the tax.

This Court held the tax to be void, as a regulation of interstate commerce.

It will be observed that the "running and using" of every car was declared to be a privilege, and that the tax was imposed upon every car used, without discrimination as to its *use*. So far as the statute was concerned, the use was an *unit*, regardless of the nature of the commerce in which the car might be used. Practically, every moment of *use* was most probably in both branches of the business, since local and "through" passengers habitually use and occupy the same car at the same time. While different seats are occupied, the car-use by the company is the same. Where, as in that case, the tax is on the *running* and *using* of cars, it must be paid, regardless of the nature of the commerce in which the car is used. Necessarily, as the Court afterward said in *Pullman Palace Car Company vs. Pennsylvania*, when explaining the case, it was a tax "upon the right to carry on the business at all," and therefore was a *direct* burden upon

the commerce as an unit itself.[1] As Mr. Justice Blatchford said:

> "The tax was a *unit*, for the privilege of the passenger and all its accessories. No distinction was made in the tax between the right of transit as a branch of commerce between the States and the sleeping and other conveniences which *appertained* to a transit in the car. *The tax was really on the right of transit*, though laid wholly on the owner of the car. So, too, the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, *so far as it was engaged in interstate commerce*, was not taxable by the State of Tennessee."

In the case now under consideration, the tax is *not* upon the running and using of the cars; neither is it upon the business or commerce, as an unit, in which the car is employed. It is imposed upon, and expressly restricted to, that *part* of the commerce or business which is intrastate.

As we view the case, *Pickard vs. Pullman Southern Car Company* is irrelevant. Moreover, the cases which have already been referred to, decided since 1886 (when that opinion was delivered), are at variance with the *inter-*

[1] 141 U. S., 25.

pretation that counsel for plaintiff in error now seek to place upon it; and if it means what *they* say, it has, in effect, been repeatedly overruled.

When objection is made by sleeping-car companies to this tax, it naturally occurs to the mind of the hearer to suggest that they can avoid it altogether by confining themselves to through, or interstate, business. If the tax is oppressive, let them cease to do an intra-state business. But to this suggestion it was answered below, and that answer will doubtless be repeated here, that in Tennessee this course is not open to the companies, for the reason that they are public carriers, who are *obliged* to receive all who come; and it is said to be most oppressive, that they should be obliged to carry "local" passengers, and at the same time be called upon to pay an onerous tax; that they ought at least to have the privilege of declining to do a local business. This contention, however, ignores the laws of Tennessee. It is true that in the case of *Pullman Palace Car Company vs. Gavin*, 93 Tenn., 53, the Supreme Court of the State said that a sleeping-car company is neither an inn-keeper nor a common carrier. The question in that case was as to the liability of the Company for money stolen from a passenger while he slept. To avoid an application of the old,

exacting, common-law rule applied to common carriers, the Court said that sleeping-car companies were not common carriers—meaning thereby that they were not such common carriers as were known to the common law. But having said what they were not, and realizing that it ought to be stated what they *were*, or at least that *something* should be said, the Court added that they had been facetiously *called* "flying nondescripts." Whatever sleeping-car companies may have been *called*, the fact is they are carriers of passengers for hire. They are, of course, not the "common" carriers known to the common law, but they are a new species of carrier, developed in modern times. In *Pickard vs. Pullman S. C. Co.*, 117 U. S., 47, this Court said:

> "The fare paid by the interstate passenger to the *railroad* company and that paid to the plaintiff (The Pullman Company), added together were merely a charge for his *conveyance* in a particular way, and there was really but one charge for the transit, though the total amount paid was divided among two recipients. The service was a single one, of interstate transit, with certain accommodations for comfort, and what was paid to the plaintiff was part of a charge for the conveyance of the passenger."

That describes a public carrier; and if a sleeping-car company, operating its cars, is not a "carrier of passengers," what is it?

Even though it be said, and by a court, that a thing is a "flying nondescript," it is not thereby said that a "flying nondescript" may not be a carrier of passengers for hire. Suppose an automobile were not *called* an automobile, but a "flying nondescript," would that imply that it could not be so used as to be a carrier of passengers for hire?

Those people in Tennessee who control it, have always been averse to an association of the white and black races. In order that such association might not be enforced in public places, a law was enacted in 1875, which provided that "no keeper of any hotel, or public house, or *carrier of passengers* for hire, or conductors, drivers, or employes of such carrier, or keeper," shall be under any obligation to entertain, carry, or admit any person to his "house, hotel, carriage, or *means of transportation*, or place of amusement;" and it is the law to this day.[1]

As a consequence, no "carrier of passengers" is *obliged* to carry either a "local" or a "through" passenger in Tennessee; and if a sleeping-car company is a "carrier of passengers," of course *it* is not; but it can decline to carry either classes or individuals.

[1] Acts 1875, ch. 130; Code of Tennessee, Shannon, section 3046. This is a valid statute. 9 Baxter (Tenn.), 584.

In the case of *Railroad Co. vs. Katzenberger*, 16 Lea (Tenn.), 380, the question was whether the *Railroad Company* was liable for the loss of the baggage of a passenger in a sleeping-car. The Supreme Court of Tennessee held that it was liable, upon the ground that "it must respond to its obligations as a carrier of passengers, whether it carry on the sleeper of the Pullman Car Company, or in its own coaches provided by itself." According to this view, the Railroad Company is the responsible carrier, and certainly it cannot be said by anyone that a railroad company is not a "common carrier." The language of the statute is, no "carrier of passengers for hire" shall be obliged to admit any persons to his "carriage," or to his "means of transportation."

Whether the Railroad Company be considered the carrier, from one point of view, and the Sleeping-car Company, from another, is immaterial under the statute. The carrier controlling the "means of transportation" is permitted to decline to receive and carry.

The objection, viz.: That the Company ought not to be *obliged* to carry, and then be heavily taxed for engaging in the business, is not well taken, aside from the Act of 1875. Telephone and telegraph companies are not allowed to refuse to receive and transmit messages, yet

the fact that they are required to serve all who come, has never been understood to denude the State of the power to tax them. Public mills must grind in the order in which the grists come. The tolls and charges of millers, bakers, carriers, telephone and telegraph companies may be, and often are, regulated and fixed by law; but this fact has never been understood to have the effect to deprive the State of the power to tax them.

For these reasons we submit that the statutes hereinbefore mentioned (called the Acts of 1889 and 1891) are valid, and the taxes imposed thereby are not regulations of inter state commerce.

We come now to the Act of 1887:

III.

The Act of Tennessee of 1887 is not inimical to the interstate commerce clause of the Constitution of the United States, and therefore is valid.

The act of 1887 is as follows:

> Sec. 4. The rate of taxation on the following privileges shall be as follows: . . .
>
> SLEEPING-CAR COMPANIES.
>
> Each company *doing business in this State*, on each car, per annum.....$500.00

The question is one of construction. But before proceeding to construe this statute, there are certain rules of interpretation which should be referred to as guides.

They are—

1. *General* words in an act should not be so construed as to give an effect to it beyond the legislative power, and thereby render the act unconstitutional; but if it be possible, a construction shall be given to it that will render it free from constitutional objection. And the presumption is that the Legislature intended to enact a law within its powers.[1]

2. If a statute is fairly susceptible of two constructions, that one will be adopted which will avoid the effect of unconstitutionality, even though it may be necessary, for this purpose, to disregard the more usual or apparent import of the language employed.[2]

3. In making the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should *not* be allowed to control *construc-*

[1] Grenada *vs.* Bragden, 112 U. S., 269; Marshall *vs.* Grimes, 4 Miss., 27, 31; U. S. *vs.* Sanges, 48 Fed. Rep., 77, 91.

[2] Parsons *vs.* Bradford, 3 Peters, 433; Black on Inter. Laws, 94; Railroad *vs.* Harris, 99 Tenn., 687, 704; Suth on Stat. Const., sec. 332, citing cases from fourteen States.

tion, in arriving at the true *intention* and *effect* of state legislation.[1]

4. Tax laws, and other laws, general in character, enacted to further important *public* interests, should be construed with liberality, so as to carry out the intention of the Legislature.[2]

This statute was passed on the 25th day of March, 1887, and with the knowledge that the State could not impose any tax upon sleeping-car companies for doing interstate commerce business in Tennessee. Tennessee, very recently, had been emphatically reminded of this rule by the decision of this Court on the first day of March, 1886, in Comptroller Pickard's case.[3]

It may therefore be certainly *presumed* that the Legislature did not *intend* to impose this tax upon sleeping-car companies for doing an interstate business in Tennessee.

Is the language in which the Act is phrased such as to preclude the Court from giving to it that construction which apparently must have been intended?

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[1] Postal Telegraph-Cable Company *vs.* Adams, 155 U. S., 700.

[2] Black on Int. Laws. 325. *Silver vs. Ladd*, 7 Wall, 219, is an illustration of this rule. There a statute allowing so much land to a "married man" and so much to a "single man" as a homestead, was held to include an unmarried woman.

[3] 117 U. S., 34.

Is the language such that the Act cannot be held to be constitutional and must be held to be unconstitutional and void?

As matter of fact, the business which a sleeping-car company may do in any State, *may* be—

(*a*) "Through" or interstate business;
(*b*) "Local" or intra-state business;
(*c*) Both through and local business.

The local business may be taxed by a State, but the through business cannot. The Pullman Company was doing both through and local business in Tennessee. The question therefore is one of interpretation. Whether the statute which taxes the Company for "*doing business in this State*," taxes it for doing, and taxes it upon, local business *only;* or also for doing, and upon, "through" business? If limited to the former, the statute is valid; if extended to the latter, it is void.

Our position is that the statute should be interpreted as if it read: "Each company doing (*intra-state*) business in this State, on each car (*employed therein*), per annum, $500.00."

This interpretation is in accordance with the general rules above mentioned, and decisions which have been made.

These decisions are—

OSBORNE *vs.* FLORIDA.

33 Fla., 162; S. C., 164 U. S., 650;
25 L. R. A., 120; 39 Am. St. Rep., 99.

The State of Florida passed a revenue act, which provided that a prescribed tax should be paid by all express companies "doing business in this State." It was insisted for the Company, that this language was so broad as to impose the tax upon all express business. It was, however, held otherwise. The statute was *construed* to impose the tax upon the companies for doing local, or intrastate business only, and so construed it was sustained. Such being the construction placed upon the statute by the Supreme Court of Florida, the judgment was sustained by this Court.[1]

The language of the Florida and Tennessee statutes are the same.

PACIFIC EXPRESS COMPANY VS. SEIBERT.

142 U. S., 339 (1892).

The State of Missouri imposed a tax on express companies for all sums earned or charged, for "the business done within the State." The Pacific Express Company in point of fact, did both local and through business,

[1] 164 U. S., 650.

within the State; but the Circuit Court held that the words "business done in the State," *meant* business *begun and ended* in the State, or intra-state business. That Court also held that even if the act should be construed to embrace the earnings from *both* local and through business, the act would still be good, because these earnings *could be separated*, and the tax be restricted to the local branch of the business.[1]

This judgment was affirmed on appeal.

This Court said:

> "The question on this point, therefore, is narrowed down to the single inquiry, whether the tax complained of in any way bears upon or touches the interstate traffic of the company, or whether on the other hand, it is confined to its *intra-state* business. We think a proper construction of the statute confines the tax which it creates to the *intra*-state business, and in no way relates to the interstate business of the company. The act in question, after defining in its first section what shall constitute an express company, or what shall be deemed to be such in the sense of the act, requires such express company to file with the State Auditor an annual report 'showing the entire receipts for business done *within this State*' of each agent of such company doing business *in this State*, etc., and further provides that the amount which any express company pays 'to the railroads or steamboats *within this State* for the transportation of their

[1] 44 Federal Reporter, 310, 316.

freight *within this State*' may be deducted from the gross receipts of the company on such business; and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged 'for the business done *within this State*,' etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, expressly limit the tax to receipts for the sums earned and charged for the *business done within the State*. This positive and oft-repeated limitation to business done within the State, that is, business begun and ended within the State, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the Court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed does not in any manner interfere with interstate commerce."

In *Ratterman vs. Western Union Telegraph Company*, 127 U. S., 411, a tax imposed by a statute of Ohio, upon the "gross receipts" of a telegraph company, was sustained. The *statute* made no distinction on its face, between receipts from local, and from interstate, business. Nevertheless it was sustained, for the reason that the

receipts could be, and in point of fact were, separated; and (under the rules of interpretation already announced) it was held that the statute *meant* receipts from intrastate business.

Such was the holding also in *Western Union Telegraph Co. vs. Alabama*, 132 U. S., 472 (1889). The State of Alabama imposed a tax upon the gross receipts of telegraph companies derived from "business done in this State." The tax was sustained on the ground that it *meant* business done *wholly* within Alabama.

MAINE VS. GRAND TRUNK RAILWAY,
142 U. S., 217 (1891).

The State of Maine enacted a statute, which provided that every railroad company, whether wholly or partly within the State, should pay "an annual excise tax for the *privilege* of exercising its franchises in the State." The tax was fixed at a certain per cent. of the *gross* earnings, and when the railway was partly outside the State, the tax should be apportioned according to the mileage within the State.

The Grand Trunk Railway Company was a corporation of Canada, operating a railroad which traversed the State of Maine.

The Court said there could be no question as to the power of a State to impose an excise tax upon the defendant for the privilege of exercising its franchises within the limits of the State.

And the Court further said that "as the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State, in its judgment, may deem most conducive to its interests or policy." [1]

Fairly and properly interpreted, this Act of 1887, passed by the Legislature of Tennessee, is to be interpreted as if it *expressly* restricted the tax to business done *wholly*—that is, begun and ended—within the State of Tennessee. So construed, it is, in this respect, the same as the Acts of 1889 and 1891.

But a difference does exist, which is to be noted here. The Acts of 1889 and 1891 fixed the tax at a round sum —$3,000 per annum upon the intra-state business, regardless of the volume of business done. The Act of 1889 measures the tax by the number of cars employed. The tax is imposed (by this Act of 1887) on the Company for

[1] This case has been several times approved: Post. Tel. Co. vs. Adams, 155 U. S., 609; Ashley vs. Ryan, 153 U. S., 446; Ficklin vs. Shelby Co., 145 U. S., 23; N. Y. R. R. vs. Penn., 158 U. S., 440.

the intrastate business done, but it is determined by the number of cars used. Over one hundred cars were used in Tennessee on all the railroad lines every year,[1] but they were employed in all branches of the business. Two cars were used constantly between Memphis, Tennessee, and Atlanta, Georgia, by way of Nashville, Tennessee, which cars would run so as to *lie over a day* at Nashville, and at Memphis, every trip—thus in effect, as we insist, making Nashville and Memphis in Tennessee the termini of the "run."[2]

The Comptroller determined that the Company was running two cars regularly in local business, and that the local business done on the through cars was "equivalent," on the average, to *one* car. Accordingly he assessed the Company as follows:

Nashville to Memphis,	1887, 2 cars	$1,000.00
Nashville to Memphis,	1888, 2 cars	1,000.00
Nashville to Chattanooga,	1887, 2 cars	1,000.00
Nashville to Chattanooga,	1888, 2 cars	1,000.00
One car for 1887 (*averaged*)		500.00
Total for two years		$4,500.00

Trans., 52.

This method of averaging is well recognized. Where the specific items of property—like cars—are constantly

[1] Trans., 52.
[2] Trans., 51.

changed and shifted according to the exigencies of the business, the number to be taxed may be *averaged*.

American Refrigerator Co. vs. Hall, 174 U. S., 70;
Union Refrigerator Co. vs. Snyder, 177 U. S., 149.

The *effect* of the tax upon the Pullman Company is not revealed. It *is* shown that the gross receipts of the Company in Tennessee from its interstate business are about $475,000.00 per annum, and the receipts from local business about $25,000.00 a year. Over 100 cars are employed and only *five* assessed (for 1887–1888) as doing the local business. This proportion is just. It is also shown that the Pullman Company by contract required the railroad companies to furnish all ice and fuel; to repair all injuries to cars, regardless of fault; to haul the sleepers *free;* and to pay the Sleeping car Company *three cents per mile* for the privilege of doing so. (Trans., 22–26.) It is not even intimated in the record that the tax is *interfering* with the Company, or devouring its profits. The Company has been careful not to disclose the profits made, even from intra-state business.

It is clear from the facts that the contribution which these statutes demand shall be made, to bear the burdens of public expense, are comparatively light and unimportant. Consequently the question is merely one of the

power of the State to tax the local business of a company, which *also* does interstate business.

It is settled, as we think, that the power exists. There are many reasons why it should, and none why it should not. Property, franchises and business may be taxed; why may not that *part* of the business which, if standing alone, could be certainly taxed, be taxed also, even though the company doing the business happens to be at the same time doing interstate business, which cannot be taxed?

IV.

The case then comes to this: The Pullman Company does a business which is partly of a local, and partly of an interstate character. The State of Tennessee has imposed a privilege tax upon that part of the business which is local or intra-state. The interstate part of the business is not taxed at all.

It is neither claimed, nor attempted to be shown, that the tax is so onerous as to be an interference with the Company's business. It is neither claimed nor attempted to be shown that the tax is grossly disproportionate even to the profits derived from local business taxed. It is neither claimed nor attempted to be shown that the tax

is unequal with respect to other businesses and companies similarly situated. This being the case, we respectfully submit that the judgment below should be reversed. For, as said by Chief Justice Raney of the Supreme Court of Florida in *Osborne vs. State* (33 Fla., 162):

> "It is not to be doubted that under our statute,[1] any citizen of the State or of any other State, or any body corporate of either, that should enter upon the express business in this State, proposing to confine itself to local, or State business, or actually doing so, would be subject to all the provisions of the statute; and we cannot see how it can be, that an engagement by any such person, natural or artificial, in local business can be relieved from the provisions of the statute by an engagement at the same time in interstate commerce business; and how his engagement in the latter business can make the statute inapplicable to the other.
>
> Is it true that the merchant who may be doing a large local business, can exempt himself from the statute by the fact that he may also do a regular business with customers in other States, to whom he sells and ships goods? We do not think that anything but interstate and foreign business, or business with the Indian tribes, is protected by the clause in question, or that that clause is the basis for interfering with a State's dominion over its own commerce, or for prescribing the mere form of its legislation as to its own affairs."

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[1] For statement of the case, see ante, page 41.

If such a tax were so onerous as to be destructive of the whole business, an altogether different question would be presented. Is the power of a State to tax *unlimited?* The question is one not necessary to be answered here.

We respectfully submit that the judgment of the Court below is erroneous, and that it ought to be reversed.

CHARLES T. CATES, JR.,
Attorney-General of Tennessee.

JOHN J. VERTREES.
Counsel for plaintiff in error.

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Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. ~~289~~ 27.

J. W. ALLEN, Comptroller &c., *Plaintiff in Error,* *vs.* THE PULLMAN COMPANY, *Defendant in Error.*	In Error to the Circuit Court of the United States for the Middle District of Tennessee.

ARGUMENT FOR DEFENDANT IN ERROR.

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J. W. ALLEN, Comptroller &c., *Plaintiff in Error,* vs. THE PULLMAN COMPANY, *Defendant in Error.*	In Error to the Circuit Court of the United States for the Middle District of Tennessee.

ARGUMENT FOR DEFENDANT IN ERROR.

This writ of error is brought to reverse the three judgments shown on pages 59 and 60 of the printed record. These judgments were recovered by the Pullman Company for taxes which the state of Tennessee forced it to pay.

The three cases involve different transactions and three distinct statutes of the state of Tennessee.

Defendant in error refused to pay these taxes and obtained from the federal court in Tennessee a final decree enjoining the Comptroller of Tennessee from attempting to collect them. That decree was reversed in this court

(139 U. S. 658), not on the merits, but because equity did not have jurisdiction of the subject matter.

Thereupon defendant in error paid the taxes under protest, brought the suits involved on this writ to recover back the taxes and obtained judgments therefor in the United States Circuit Court in Tennessee.

Action No. 2867 in the court below involved taxes for 1887 and 1888, imposed under the Tennessee tax act of 1887 which laid a tax of $500 on each car operated by a sleeping-car company. The amount involved and its items are shown by the record (pr. rec. 30) in the bill for taxes rendered by the state comptroller, and which was afterwards paid, and are as follows:

2 cars, Nashville and Memphis, 1887	$1000.00
Interest to date	264.16
Same for 1888	1000.00
Interest to date	204.16
2 cars, Nashville and Chattanooga, 1887	1000.00
Interest to date	264.16
Same for 1888	1000.00
Interest to date	204.16
One other car equivalent on business done on all interstate cars, 1887	500.00
Interest	132.08
Same for 1888	500.00
Interest	102.08
Total	6170.80

Action No. 2866 involved taxes for three years from April 8, 1889, to April 8, 1901, imposed under the Tennessee tax act of 1889, which laid a tax of $3,000 on each sleeping-car company. The amount, as appears from the said bill of the comptroller, is as follows:

April 8, 1889, to April 8, 1890, one year	$3000.00
Interest	428.50
April 8, 1890, to April 8, 1891, one year	3000.00
Interest	248.50
April 8, 1891, to April 8, 1892	3000.00
Interest	68.50
Total	9745.50

Action No. 2903 involved a tax for the year ending April 8, 1893, imposed under the Tennessee tax act of 1891, and as is shown by the said comptroller's bill (pr. rec. 32), was as follows:

April 8, 1892, to April 8, 1893.....$3,000

Interest on these sums to the date of the judgments, less a rebate hereinafter shown, brought them up to the amounts of the judgments.

I.

TAXES UNDER THE LAW OF 1887 FOR THE YEARS 1887 AND 1888.

These taxes were levied under the Tennessee general revenue act of 1887, which provided as follows:

"That the rate of taxation on the following *privileges* shall be as follows:

"Sleeping Cars--Each company doing business in the state on each car per annum, $500."

Section 8 of the same act is as follows:

"Be it further enacted, That any and all parties, firms or corporations exercising any of the foregoing privileges must pay the tax as set forth in this act for the exercise of such privilege, whether they make a business of it or not."

Allen, comptroller, issued his warrant on August 28,

1891, reciting that the Pullman Co. was liable under the section above quoted, for taxes for 1887 and 1888 on two sleeping cars running locally between Nashville and Memphis; on two cars running locally in the same years between Nashville and Chattanooga, and on one car for the same period, as the proportion due Tennessee on the interstate business on cars run through Tennessee, a total of $6170.80. Under that warrant the sheriff distrained upon a sleeping car in Nashville, and thereupon the Pullman Co. paid the taxes under protest. (pr. rec. 52.)

The business in which the Pullman Company was engaged and the manner in which it operated cars into and through Tennessee, and also certain cars which it is claimed were run entirely within Tennessee, is shown by the special finding of facts (pr. rec. 50 & 51), as well as by a stipulation in regard thereto, the contract under which they were operated (pr. rec. 22-28) and also by testimony (pr. rec. 32 to 42). There is no contradiction or dispute on these matters. And from these it clearly appears that during all of the time covered by these different suits the business of the Pullman Company was principally interstate business, and its business and the conduct of the same in Tennessee, were exactly the same as that shown in *Pickard* v. *Pullman Co.*, 117 U. S. 34, and *Pullman Co.* v. *Nolan*, 22 Fed. Rep. 276, which were there held to constitute interstate commerce.

In addition to the facts appearing in the opinions of the last two cases, the findings, stipulation and depositions referred to show that certain cars of plaintiff were run as follows: A car left Memphis in the evening and ran to Nashville, arriving there in the morning. It left Nashville the following evening, passed through Chattanooga and arrived

in Atlanta, Georgia, the following morning. The following evening it left Atlanta on its return trip, passed through Chattanooga and reached Nashville the following morning. It then left Nashville on the evening of the same day, and completed its trip by arriving at Memphis the following morning. There were no cars whose run was only between Nashville and Chattanooga. The only cars passing through Chattanooga continued on their way to Atlanta, Georgia.

Even if, however, there had been cars running only between Nashville and Chattanooga, those cars would have run interstate, as the railroad passes into both Alabama and Georgia in going to Chattanooga. *Hanley* v. *Kansas City S. R. Co.*, 23 U. S. Supreme Ct. Rep., 214. There are several stations on that line of road in Georgia.

Four cars were required to fill these lines between Memphis and Atlanta. The same cars were not used continuously in this service, but were changed from time to time by defendant in error. On trips from Memphis to Nashville, tickets were sold to Nashville and intermediate points, but no further. On trips from Nashville to Memphis, tickets were sold to Memphis and intermediate points, but no further. On trips from Atlanta to Nashville, tickets were sold from Atlanta to Nashville and all intermediate points, including Chattanooga. On trips from Nashville to Atlanta, tickets were sold to Atlanta and all intermediate points, including Chattanooga.

From 1887 to the present time the Pullman Co. has operated sleeping cars on most of the principal railroads of Tennessee. Such sleeping cars have all been operated under contracts between it and the several railroad companies similar to the contract shown in this cause. On those railroads the cars have been run into and out of Tennessee,

and, on such cars, passing interstate, defendant in error has, in every year, received passengers whose trips only extended from one station in Tennessee to another station in Tennessee.

From 1887 to 1893, plaintiff had agents in Nashville, Chattanooga and Memphis, whose duties were to see that cars were cleaned, that fresh linen was provided, that the porters and conductors were in attendance and that the cars were attached to the proper train.

By a stipulation or statement signed by counsel for both sides, (pr. rec. 28 & 29) it appears that there was some question as to whether the two cars between Nashville and Memphis were, during part of 1887, run back and forward between those places without passing out of the state on their regular runs, and also some discussion with representatives of the state about a compromise in regard thereto.

The court made a special finding on this point as follows (pr. rec. 51):

"5. The sleeping cars were operated during a portion of the year 1887 between Nashville and Memphis, Tennessee, which during that time, though used constantly between said points, did not pass beyond the limits of Tennessee. It was agreed that, without either party waiving any right the plaintiff's claim in No. 2867 should be abated $1,234.00."

In its opinion the court allowed to the comptroller the $1,234 referred to in the fifth special finding, and said that inasmuch as it did not appear that there was a changed condition in 1888, it would make the same allowance for 1888. In other words, it rejected from the claim for reimbursement, all taxes paid in connection with cars sufficient to fill the line between Nashville and Memphis, and gave judgment only for the tax collected by the state on ac-

count of cars running between Nashville and Atlanta, and on account of the proportion of business done in Tennessee on all other interstate cars.

We think it clear, from the record, that defendant in error operated no cars local to the state of Tennessee. But as the circuit court held that the entire tax for 1887 and 1888 levied on account of cars running between Memphis and Nashville could not be recovered, and as we have taken no cross-appeal, all question concerning those cars and that run are eliminated from the case.

By the act of 1887, the state of Tennessee declared the running of sleeping cars in Tennessee a privilege and imposed a tax "on each car $500 per annum." This attempt at taxation is identical with that considered in the case of *Pickard* vs. *Pullman Co.*, 117 U. S., 34. The act considered in that case declared the running of sleeping cars a privilege and imposed a tax of $50 on each car.

The tax act of 1877 involved in the *Pickard* case, and the tax act of 1887 involved in the case at bar, may properly be shown as follows:

Act of 1877.

"That the running and using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared to be a privilege, and the companies * * * * * * * shall be required to pay to the Comptroller by the first day of July following fifty dollars ($50) for each and every of said cars or coaches

Act of 1887.

"That the rate of taxation on the following privileges shall be as follows:

Sleeping car companies—Each company doing business in the state, on each car per annum, five hundred dollars ($500)."

Sec. 8 of the same act is as follows:

"Be it further enacted that any and all parties, firms or corporations exer-

used or as run over said roads; and if the said privilege tax herein assessed be not paid as aforesaid the Comptroller shall enforce the payment of the same by distress warrant".

cising any of the foregoing privileges must pay the taxes as set forth in the act for the exercise of such privilege, *whether they make a business of it or not*".

In the *Pickard* case the comptroller of the state levied a tax of $50 upon every one of the Pullman Co.'s cars that ran through the state. This Court held the tax unconstitutional because it was a regulation of interstate commerce. The opinion was filed in 1886, and thereupon Tennessee at the next meeting of its legislature passed the act of 1887, now before the Court. The tax levied is identical with the one considered in the *Pickard* case, except that the amount is raised from $50 to $500 per car. By reference to what defendant did under the act of 1887, we find its object. This Court stopped the levy of $50 on each car, and thereupon the comptroller thought he would have the tax raised to $500 per car and levy it only against certain cars which he claimed were running locally in Tennessee.

The Circuit Court in deciding the case at bar considered the similarity of these two statutes and said (pr. rec. 53):

"The language of this statute is undistinguishable from the revenue act of 1887 [1877], section 6, except that the privilege tax imposed by the latter act was $50.00 per annum on every sleeping car or coach, while the privilege tax under the act now in question is $500.00 on each car per annum. The act of 1887 [1877], section 6, was under consideration by Chancellor Cooper in 3 Tenn. Chancery, 587, and was construed as applying to interstate commerce and was held to be valid, and the learned chancellor's judgment was affirmed upon appeal to the supreme court of the State, that court apparently accepting not only his conclusions but the reasoning by which those conclusions were reached.

"In *Pickard* vs. *Pullman Southern Car Company*, 117 U. S. 34, the Supreme Court of the United States, on writ of error to the circuit court of the United States for the middle district of Tennessee, reached a different conclusion and decided the question otherwise; and, in the closing paragraph of the opinion, said:

"'The question involved in this case was before the court of chancery of Tennessee in *Pullman Southern Car Company* vs. *Gaines*, 3 Tenn. Chancery, 587, on the same facts, as to the privilege tax for 1887 [1877]. That court held (and it is stated that the supreme court of Tennessee, on appeal, affirmed its ruling), that this privilege tax, as to such of the cars as passed and repassed through the State, and did not abide in it, was not amenable to the objection that it interfered with interstate commerce. The view taken was that the property of the foreign corporation, used in Tennessee, could be taxed as property, or by an excise on its use; and that the tax in this case was not directly on the object of commerce or directly aimed at commerce. We have given to the views set forth by the Tennessee chancery court the consideration due to the judgments of that tribunal, but are unable to concur in its conclusion.'

"It must therefore be regarded as a proper construction of these revenue acts, the language of which has just been quoted, that they do apply to interstate commerce, and this construction is the one adopted both by the State supreme court, in the *Gaines* case, following Chancellor Cooper, and by the Supreme Court of the United States in the *Pickard* case. The supreme court of the State decided that the act, construed as applicable to interstate commerce, was valid, while the Supreme Court of the United States held that the statute as thus construed was invalid, and it was only in regard to the validity of the statute that the views of the two courts were divergent."

The act of 1887, however, makes no distinction between local and through cars. It is exactly the same as the one involved in the *Pickard* case. The comptroller had not the power to change the object of the act or to render it constitutional by deciding that he would only enforce it against

certain cars. The act requires the levy of the tax of $500 on each car run in Tennessee, and it is not for the comptroller or any other executive officer to say that he will remit the major effect of the statute and levy it only upon the cars that he claims operate locally in Tennessee. It is so plain as not to call for or allow construction by him. If the act as passed is unconstitutional, no change or limitation of the terms, imposed by an executive officer, can turn it into a constitutional act.

The tax imposed by the comptroller is for two cars running between Nashville and Memphis, for two years; two cars running between Nashville and Chattanooga, for two years; and an arbitrary fixing of one car in each year as the proportion of local business done on interstate cars for two years. Why the comptroller stopped at that point and made this modification of the statute or on what principle he based it, is hard to see. Even if cars had run locally between Memphis and Nashville, why did he not stop with those cars? He also assesses two cars for two years between Nashville and Chattanooga. It is conceded that no cars ran locally between those places, the cars running on to Atlanta. Why did he include them and not include the cars running from Nashville to Louisville? He only taxed one car on account of interstate business. Why did he not tax two cars or tax one half of all the cars running, which would be taxing about 50 more? Perhaps the best refutation of this action of the comptroller is to be found in the brief filed by the attorney general of Tennessee in this Court on the hearing of the equity cases we have already mentioned, which involved these same taxes (139 U. S. 658). On page 20 of that brief the attorney general states his proposition thus:

"The cars employed in a mixed interstate and internal business are likewise taxable and embraced by said statute."

After discussing this proposition through several pages, he says (p. 31 *Ibid*):

"The suggestion that cars must be treated as being engaged in interstate business because they are run on lines of railway that reach beyond the state, needs only to be mentioned."

"The conclusion on this point is that the Pullman Co. is liable for taxes on both of the classes of cars named".

It hardly requires argument to show that the comptroller has no power to vary the statute, to limit its operation or to extend it. The attorney general in the brief referred to, so states, and he insists, disregarding the *Pickard* case, that all the cars, interstate and others, must pay this tax. Taking this as true, we have a case absolutely identical with the *Pickard* case, and we can do nothing else than refer to that case, both as an argument and adjudication against the validity of the tax levied under the law of 1887.

In *Leloup vs. Mobile*, 127 U. S., 647, the Court said:

"But it is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. *But that fact does not remove the difficulty.* The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, *if not already taxed in some other way, may be* subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

Sec. 8 of the Tennessee revenue act of 1887 is as follows:

"Sec. 8. BE IT FURTHER ENACTED, That any and all parties, firms or corporations exercising any of the foregoing privileges *must pay the tax* as set forth in this

act for the exercise of such privilege, *whether they make a business of it or not.*"

In *Lyng vs. Michigan*, 135 U. S., 166, the Court said:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or *on the occupation or business of carrying it on*, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. *Leloup vs. Mobile*, 127 U. S., 640, 648, and cases cited."

An argument is made on behalf of the state that the language of the act of 1887, although substantially the same as that of 1877, ought now to be limited so as to preserve its validity, and several cases are cited in support of that contention as being cases where the court limited the general words in order to preserve the constitutionality of an act, but the cases do not apply.

In *Pacific Express* against *Seibert*, 142 U. S. 350, the tax was levied only upon the receipts from business done within the state and, therefore, there was no need to construe a doubtful act. The act was not doubtful. The tax was limited to *intra* state receipts. The act required the agent to make a "report showing the entire receipts for business done within this state."

In *Maine* against *Grand Trunk Ry.*, 142 U. S. 217, nothing was left to construction. The statute provided for a tax on gross receipts and expressly stated that the average gross receipts should be ascertained and not multiplied by the number of miles operated within the state.

In *Osborne* against *Florida*, the revenue act before it came before the Federal court had been construed by the State Supreme Court to relate only to local or domestic business.

But even if the statute had limited the tax to cars used only within the state, still the judgment under consideration would be good. The circuit court gave judgment only for taxes exacted on account of cars running between Nashville and Atlanta, and on account of what is styled in the bill rendered by the comptroller, "One other car equivalent on business done on all interstate cars in 1887", and a like amount for the succeeding year. Therefore, according to the undisputed facts as found by the special findings, the taxes covered by the judgment are those levied upon the cars referred to, which were engaged in interstate commerce.

In determining the validity of a statute, it is fair and proper to consider its purpose and effect. The act of 1877 imposed a tax of fifty dollars per car and it was levied on about fifty or sixty cars, as shown by the *Pickard case*. When that act was held unconstitutional, the legislature, at its next session, passed the act of 1887, raising the tax to $500 per car, and the comptroller assessed that amount against five cars per annum. When the act of 1887 was declared unconstitutional by Judges Jackson and Key, then the legislature tried another way of taxing the interstate business by the act of 1889, imposing a tax of $3,000 a year upon the company. Is there not plainly inferable from this an attempted evasion of the decision of the court and an attempt to impose the whole tax that had been declared unconstitutional, on a few cars?

In *Morgan* vs. *Louisiana*, 118 U. S., 455, the Court said (p. 462):

"When the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose".

We therefore respectfully submit that the validity of the tax levied under the law of 1887, is already settled by the case of *Pickard* vs. *Pullman Co.*, and plaintiff is entitled to judgment for these taxes, with interest.

When the comptroller was attempting to collect the taxes involved in the first two cases, defendant in error filed in this court a bill to restrain the collection of such taxes. The application for an injunction was made to Judge Key and an injunction was granted by him. That equity case came on for hearing before Judges Jackson and Key, and the prayer of the bill was granted and the injunction made perpetual. It is to their opinion that the opinion in the case at bar refers. The equity case was then taken to this Court and the decree was here reversed on the ground that there was a remedy at law and that therefore there was no jurisdiction in equity. 139 U. S., 658.

There is nothing in this opinion, however, that questions the decision of Judges Jackson and Key so far as the merits are concerned.

II.

THE REVENUE ACTS OF 1889 AND 1891.

These acts provide for a privilege tax of $3,000 per annum. Under the act of 1889 taxes were collected for the years 1889, 1890 and 1891, and under the act of 1891, for the year 1892, the rate being $3,000 per annum, and the amount collected from defendant in error, including a considerable amount of penalties and interest.

The two acts are substantially identical and the act of 1889 is as follows:

"Sec. 4. BE IT FURTHER ENACTED, That the rate of taxa-

tion on the following privileges shall be as follows (per annum):

* * * * *

Sec. 5. BE IT FURTHER ENACTED, That the following corporations shall pay directly to the comptroller's office the following taxes:

* * * * *

SLEEPING CAR COMPANIES.

(In lieu of all other taxes except *ad valorem* tax.)

Each company doing business in this state, for one or more passengers taken up at a point in this state and delivered at another point in this state, and transported wholly within this state, per annum, $3,000.

Sec. 8. BE IT FURTHER ENACTED, That any and all parties, firms or corporations exercising any of the foregoing privileges *must pay the tax* as set forth in this act for the exercise of such privileges, *whether they make a business of it or not.*"

The reasoning contained in the opinion of the circuit court on this act (pr. rec. 56, 58) is a strong argument in favor of our position, and to it we respectfully call the attention of the court. The rulings of Judges Jackson and Key, referred to in the opinion, were made in connection with these same taxes, as before stated.

It is clear that plaintiff operates no cars local to Tennessee and that whenever it accommodates a passenger locally in the state, it is but a part of or adjunct to its interstate business done under contracts that call for interstate business.

In the *Pickard* case the court held the tax void because it was an interference with interstate commerce. In the statement of facts we find the following:

"The same cars also *transported passengers from points in Tennessee to other points in that State* whenever they properly applied for such transportation, but the number of such passengers *bore an inconsiderable proportion to the other passengers* transported in those cars; that those cars

ran into, out of or across Tennessee, making such stops as the trains to which they were attached made." (p. 41.)

In the opinion it is said:

"The plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege." (p. 46.)

This act covers interstate commerce and is therefore invalid. If plaintiff only operated one line of sleeping cars through Tennessee, for instance, the Illinois Central line running from Chicago to New Orleans, and a single passenger got on a sleeping car at Martin, Tennessee, and got off at Jackson, Tennessee, then under this act it would have to pay this privilege tax of $3,000. As plaintiff operates certain interstate lines of sleeping cars, as for instance, on the Illinois Central Railroad, it can not engage in that interstate commerce and cross the state of Tennessee without rendering itself subject to this $3,000 privilege tax. It sustains such a relation to the public that, while not a common carrier or an innkeeper, yet it is bound to receive and furnish its accommodations to all those who properly present themselves. The law of the land, the common law of Tennessee, makes it obligatory upon this company, while crossing the state in going from Chicago to New Orleans, to receive passengers at Martin, Tennessee, and allow them to alight at Jackson, Tennessee, and, that being done, Tennessee levies a privilege tax on so doing, and, if the tax is valid, it can be of any amount the state deems best.

The Pullman Company is bound to afford sleeping car accommodations to any person who properly applies therefor.

In *Nevin* v. *Pullman Co.*, 106 Ill., 222, where defendant in error demurred to a declaration which alleged that it had refused to receive a passenger who properly presented

himself and offered to pay for sleeping car accommodations, the court held that the company must receive such passenger. In so holding the court, quoting from Chitty, said (pp. 228, 229):

"There are, however, some particular instances of persons exercising certain public trades or employments, who are bound by law to do what is required of them in the course of their employments without aid of express contract, and are in return entitled to a recompense, and may, therefore, be sued in case, as for a breach of duty, *in refusing to exercise their callings.*"

"It becomes important to determine, with some degree of particularity, the true relation which the Pullman Palace Car Company sustains to the public."

Mentioning the duties laid upon a railroad company to serve the public alike, the court said (pp. 230-231):

"In what respect, then, does this company differ in its relation to the public, so far as the present inquiry is concerned, from an ordinary railway company? No difference has been pointed out by counsel, and we are confident none can be. Why, then, should not the same principles be held to apply to it that apply to common carriers, and others in like employments, in so far as their relation to the public is the same?"

"Indeed, the running of these sleepers has become a business and social necessity. Such being the case, can it be maintained the law imposes no obligations or restrictions on this company in the discharge of its duties to the public?"

"If, then, this company owes any duties to the community by reason of its relation to the public, as we hold it does manifestly one of them is, that it shall treat all persons whose patronage it has solicited with fairness, and without unjust discrimination. When, therefore, a passenger, who, under the rules of the company, is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping car at a proper time for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the com-

pany is bound to furnish it, provided it has a vacant one at its disposal."

In *Elliott on Railroads*, section 1617, it is said of sleeping car companies:

"That they are under a duty to serve the public impartially and to exercise reasonable care to furnish the required service. There must be some public duty otherwise such public carriers as railroad companies would have no right to haul cars of sleeping-car companies as parts of regular railway passenger trains."

The case of *Attorney General* v. *London & N. W. Ry. Co.*, 6 Q. B. Div. 216, is commented on and quoted at length with approval, by this court in *Pickard* v. *Pullman Co.*, 117 U. S. on pages 46 and 47. It is there held that sleeping car accommodations are of as public a nature as is the carriage, and that the charges for carriage and for sleeping accommodations, are of the same character and must substantially be considered as one charge, thus putting the duty to furnish sleeping accommodations substantially on the same basis as the duty to furnish transportation.

This court quotes with approval the language of *Lord* COLERIDGE in saying:

"We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second-class carriage over a third, or by a first-class carriage over both. The charge, though written on a separate ticket, is, in our opinion, part of the charge for the conveyance of the passenger in a particular way, and is, therefore, a part of the charge for the conveyance of a passenger, received and charged for such conveyance."

Therefore there lies upon the Pullman Company a duty to furnish its accommodations to all who properly apply therefor, and it cannot, on trains running through Tennessee, and stopping at different places within that state, re-

fuse to receive as passengers all who properly apply therefor, although they are only going to spend one night on the car in traveling from one point to another within the state.

Plaintiff in error is engaged in such a business that it is impossible to carry on the interstate commerce in which it is engaged, without also, as incidental thereto, accepting passengers from place to place within the state.

We submit it would not be competent for the Pullman Company, on trains running from Chicago to Florida, to close the doors of its cars in Tennessee and refuse to open them until the car passed out of the state.

The statute of Tennessee, relied upon by plaintiff in error, which abrogates the duties laid upon common carriers, innkeepers and some others of receiving all proper persons who present themselves for carriage, &c., does not apply to defendant in error. As this statute was passed to enable common carriers, &c., to discriminate against colored people, its constitutionality is doubtful. It is certainly a statute in derogation of the common law and must be strictly construed. It must not be extended beyond its exact terms. The Pullman Co. is not a common carrier nor an innkeeper and does not follow any of the avocations mentioned in that statute. Sleeping car companies or their particular avocations are not, in terms, mentioned in the act.

In *Pullman Co.* v. *Smith*, 73 Ill., 360, the Court said (p. 365):

"The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent or principle for the imposition of such a liability upon appellant.

Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railroad company."

The same doctrine has been held in many other cases, state and federal, which are collected in Elliott on Railroads, sec. 1616, *et seq.* The same doctrine is laid down in *P. Co.* v. *Gavin*, 93 Tenn., 53.

It will thus be seen that this act of Tennessee excusing certain parties from the operation of the common law rule requiring them to treat the public alike, does not apply to defendant in error.

We submit that as the laws of Tennessee compel defendant in error to accept local passengers even if it is only engaged in and only wishes to be engaged in interstate business and then imposes a tax upon that business which may be prohibitive, the revenue act imposing such tax is unconstitutional.

The general character of the business done by defendant in error can not be questioned, and in that connection we wish to call the attention of the Court to one or two extracts from the case of *Pickard* v. *Pullman Co.*, 117 U. S., 34. In the statement of the case (p. 41) it is said:

"The same cars also transported passengers from points in Tennessee to other points in that State whenever they properly applied for such transportation, but the number of such passengers bore an inconsiderable proportion to the other passengers transported in those cars; that those cars ran into, out of or across Tennessee, making such stops as the trains to which they were attached made." (p. 41.)

On page 46 the Court said:

"The plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege."

If then, in accordance with the last citation, defendant in error carried on no business within the State in the sense in which the carrying on of business in the State is taxable

by way of license or privilege, surely this revenue act must be unconstitutional, for it applies and was meant to apply to defendant in error whether it operated cars locally within the State or not.

In *Pullman Co.* v. *Pennsylvania*, 141 U. S., 25, the Court held valid a tax upon a certain portion of capital stock *because* it was in effect a tax upon property, but in the reasoning of that case throughout it is clear that there was no intention to modify in any way the *Pickard* case, and the case is in fact an authority that the business of this company is not subject to a privilege tax.

In *Adams Express Co.* v. *Ohio*, 165 U. S., 220, in speaking of the case of *Pullman Co.* v. *Pennsylvania*, the court said (p. 221):

"The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that *the whole property of the company might be regarded as a unit plant, with a unit value*, a *proportionate* part of which value might be reached by the state authorities *on the basis indicated.*"

This is a strong declaration that the business of the company is a unit, that any local business in a state is simply incidental to the general business and cannot be separated therefrom, and, upon the theory stated, the tax of $3,000 a year for accommodating a single passenger, can be construed as nothing but a burden upon that "unit" of business, and therefore an interference with interstate commerce. A tax ascertained and graduated according to the principles announced in the two cases just cited, would, of course, be valid. But an attempt to fix a heavy tax upon interstate business through the medium of a single passen-

ger accommodated locally, is thoroughly antagonistic to what this court must have had in mind in writing the opinion from which the last quotation is made. And in support of this suggestion, we quote further from the case last cited the following extract:

"The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the State, nor from points within the State to points in other States, nor from points in other States to points within the State. It purports to provide for a tax upon *property* within the State of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from the same liability to taxation as all other *property* within the jurisdiction of Ohio. This proposition is too well settled to need argument." (p. 225.)

In *Adams Express Company* v. *Ohio*, 166 U. S., the court said (page 218):

"Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through the imposition of a tax, by whatever named called, which is in effect a tax for the privilege of transacting such commerce."

In the *Pickard* case, especially on pp. 46 and 47, the Court discussed fully the relation of defendant in error to the act of transportation and just what the defendant in error does in the operation of its cars upon a railroad. It is there held that the car is a vehicle of transit and practically belongs to the railroad; that the service rendered the passenger is a single unit covering both carriage and accommodation and that in everything connected with carriage, the car must be construed as a vehicle of the railroad company.

Inasmuch as it has been repeatedly held that state legislation which *may* operate as a burden on or interfere with

interstate commerce is obnoxious to the federal constitution, and inasmuch as this revenue act, joined to the duty imposed by law to accept passengers whenever they offer themselves, would act as such regulation of interstate commerce, it is clear that the act must be unconstitutional.

In *State Freight Tax* case, 15 Wall., it is said on page 277:

"The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State."

In *Leloup* v. *Port of Mobile*, 127 U. S., 640, it is said, on page 647:

"But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination."

The attention of the Court is respectfully called to the other parts of the decision in this case and also to the same doctrine laid down in the cases of

Telegraph Co. v. *Alabama*, 132 U. S., 472, 477.

Lyng v. *Michigan*, 135 U. S., 166.

The theory of the state of Tennessee differs from the principles above laid down. This is readily seen by referring to page 12 of the brief for plaintiff in error, where it is distinctly stated that such a tax as this must be borne by the interstate business if the local business will not support it, and that to that extent it may be a slight burden upon interstate business. The same doctrine is laid down at the foot of page 14 of the same brief.

In several cases this court had held there was an im-

portant distinction between a tax upon property and a tax upon the privilege of doing business.

In *Postal Telegraph Co.* v. *Adams*, 155 U. S., 688, a privilege tax was sustained because it was a tax imposed,

"*In lieu of all others*, as a privilege tax, and *its amount is graduated according to the amount and value of the property* measured by miles. It is to be noticed that *it is in lieu of all other taxes*, state, county, municipal. * * *

This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent determined by reference to the amount and value of the property" (pp. 697-8).

The court then said that the tax was thereby brought within the rule of the property tax cases and was not really a privilege tax. On page 696 the Court said:

"But *property* in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation *on account of its property* within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State*, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

But this tax is expressly made a privilege tax and the act provides that it shall be in lieu of other taxes "except *ad valorem* tax," thereby expressly saying that it is not a property tax or intended to be in any way gauged by the value of the property.

To sustain a tax levied upon both kinds of traffic there must be a possibility of separating the two and levying a fair tax upon the intra-state traffic. Such intra-state traffic

must be in itself a basis or reason for the tax. It is a violation of the constitution for a state to tax anything because of its relation to interstate commerce.

If the interstate business and the local business upon which only the tax could be sustained, are necessarily so mixed as to preclude separation, a tax thereon is invalid.

Ratterman v. *Western Union T. Co.*, 127 U. S., 411.

In *State Freight Tax case*, 15 Wall., it is said on page 277:

"The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State."

The fact that the legislature sought to make the license tax depend upon the receiving on the cars an intra-state passenger (which is a necessary incident to the interstate business) cannot save the tax or make it valid. In *Crutcher* v. *Kentucky*, 141 U. S., 47, the court, in holding a license tax invalid, said (p. 59):

"We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, (which is to carry goods between different States,) does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. * * * These regulations are clearly a burden and a restriction upon that commerce. *Whether intended as such or not they operate as such.* But taxes or license fees *in good faith* imposed exclusively on express business carried on wholly within the State would be open to no such objection."

The case of *Osborne* v. *Florida*, 164 U. S., 650, has been cited in support of this tax, but that case differs radically

from the case at bar. In that case the business involved was that of an express company. It is said that the express company could engage in interstate business only, and then the act would not apply to it. Moreover, the supreme court of Florida had passed upon the revenue act there in question and had given it a construction which this Court accepted as binding. By the construction so given, the tax was directed against local business only, and the express company could have engaged in interstate business alone without subjecting itself to the tax. But defendant in error is engaged in an interstate business that necessarily involves some local business. We have not in the case at bar any decision of the supreme court of Tennessee that defendant in error can in any way evade the necessity of paying this license tax.

The main idea of *Osborne* v. *Florida* is contained in that part thereof which, speaking of the express company, says (p. 655):

"It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state."

In the present case the plaintiff in error could not decline local business and therefore the principle of *Osborne* v. *Florida* does not apply.

In *Osborne* v. *Florida* it is said that if the Florida statute applied to interstate business it would be void. The opinion does not criticise the case of *Crutcher* v. *Kentucky*, 141 U. S., 47, but distinguishes it. It does not overrule any of the cases on which we rely.

While the Florida Supreme Court in the *Osborne* case

had decided that the act there under consideration did not apply to interstate business and that point formed the basis of the decision of this court, in the case at bar, we have, according to the opinion in the *Pickard* case, the decision of the Tennessee Supreme Court that the act of 1877, substantially the same as the act of 1887, did apply and was intended to apply to all cars whether used in interstate commerce or not.

In *New York* v. *Roberts,* 171 U. S., 658, this question of taxation was considered. The last paragraph on p. 664 calls attention to the very decided difference there is between corporations exercising public duties engaged in interstate commerce and the taxation that may be imposed upon private corporations. The language referred to makes it clear that the Court could have had no intention of changing its earlier decisions in regard to the taxation of interstate commerce. The case of *Osborne* v. *Florida* is not mentioned and we think that this case may properly be referred to as establishing and affirming the different decisions upon which we rest our case.

Among other late decisions to which we particularly call the attention of the Court as reaffirming the earlier decisions in regard to the freedom from taxation that must be given to interstate commerce and everything connected therewith we cite,

Vance v. *Vandercook,* 170 U. S., 438.
American Refrigerator Co. v. *Hall,* 174 U. S., 70, 77.
Austin v. *Tennessee,* 179 U. S., 343, 344, 349, 375, 376.

That the taxes involved in this case are aimed, not at local business but at interstate commerce, is fully and ably

shown by the opinion of the circuit court in this case (pr. rec. 56 to 58). The argument of that opinion is clear and convincing. These taxes are gauged by interstate business done, and have no relation to local business. If intended as a tax upon or privilege for, local business, it would have had some other measure, some other criterion than simply furnishing accommodations to a single passenger. If it were a tax of two per cent. or three per cent. upon the gross receipts from the local business, we would have no defense to it. It is, however, but a continuation of the old attempt of this state to levy a tax of about $3,000 a year upon the business of the Pullman Company, both interstate and local. It constitutes an actual burden upon interstate commerce. If the principal of it is allowed it can be used to entirely stop the interstate commerce in which defendant is engaged.

But this provision of the license act, seeking to make the business liable to a heavy tax if only a single passenger tenders fare for inter-state accommodation, is but a subterfuge to evade the interstate commerce clause of the Constitution.

In *Crutcher* v. *Kentucky*, 141 U. S., 47, it is said (p. 58):

"It is well settled by numerous decisions of this court, that a State cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In *Austin* v. *Tennessee*, 179 U. S., 343, the court said:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as

practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution" (p. 350).

"We endorse fully what was said by this court in *Mugler* v. *Kansas*, 123 U. S., 623, 661: 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby to give effect to the Constitution'" (p. 344).

In *Morgan* v. *Louisiana*, 118 U. S., 462, the Court said:

"When the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose."

In whatever language a statute may be framed, its purpose and its validity under the interstate commerce clause of the federal constitution must be determined by its natural and reasonable effect.

Henderson v. *New York*, 92 U. S., 259, 268.

The test in such a case is upon what does the burden really rest? The tax is not valid because laid upon local and domestic as well as interstate traffic.

Case of the State Freight Tax, 15 Wall., 232, 272.

Counsel for plaintiff in error repeatedly urge that such tax as the present one ought to be upheld because of the protection defendant in error receives in Tennessee. It must be remembered that the license act expressly reserves the right to add further taxes *ad valorem*. Moreover, a state is not entitled to impose a tax on account of the protection

it accords to the instrumentalities of interstate commerce. As between different countries it might be so, as between states bound by the same federal constitution, it is not so. There is a certain reciprocity necessary between the states. The relations of the different states to each other under the federal constitution are such that a citizen of one state has a right to demand protection of the laws of a neighboring state while in it. Business and freight can be transported across a state without stopping and it would not be seriously contended that it could be taxed. Yet it would be protected during such transit. The protection afforded to the citizens and property of one state while passing through another may not be evenly balanced for any one month, but will be in the long run, and whether it is or not the federal constituion contemplates that there shall be reciprocity in the protection afforded by one state to another both over citizens and property. The argument is therefore fallacious that a state acquires a right to tax either a person or his property simply because they pass through that state and are temporarily under the protection of its laws.

There is no distinction in principle between persons and property. If there is reciprocity between the States in the protection of each other's citizens, there is also in regard to property. If the intercourse between States is that of wholly independent nations, the claim of right to tax may be good, but it should be allowed equally on persons and property. If the Constitution of the United States has abolished foreign lines between the States and given reciprocal rights to the citizens of the States, those rights must apply to their property also.

J. S. Runnells,
William Burry,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

No. 27.—October Term, 1903.

J. W. Allen, Comptroller of the State of Tennessee, Plaintiff in Error, vs. Pullman's Palace Car Company. | In error to the Circuit Court of the United States for the Middle District of Tennessee.

[November 16, 1903.]

This is a writ of error to review the judgment of the Circuit Court for the Middle District of Tennessee in suits brought by the Pullman's Palace Car Company to recover from the State of Tennessee moneys paid under protest for taxes levied and collected by virtue of certain laws of the State requiring the payment of sums for the years 1887 to 1893, inclusive. These statutes are set forth in the opinion. The cases were tried to the court without the intervention of a jury, and separate findings of fact and law were made. From the findings of fact it appears that the Pullman Company, a sleeping car company, operated its cars in Tennessee under a contract with railroad companies traversing the State. These contracts required the Pullman Company to furnish the cars, keep the same in order, and to hire the porters and conductors. The railroad companies paid the Pullman Company for the privileges afforded, furnishing light, heat and water for the cars, and repairing damages due to accident and casualty. The special finding of facts as to the manner of operation in transporting the cars of the Pullman Company sets forth:

During the years 1887 and 1888 the company operated sleeping cars, as follows: A car left Nashville and went to Memphis nightly and on this car tickets were sold to passengers from Nashville to Memphis and not beyond. This car remained in Memphis during the day, returning to Nashville the following night and going no further. The next night, it went from Nashville by way of Chattanooga to Atlanta, Georgia. It remained in Atlanta during the day and returned the next night from Atlanta to Memphis. On the trip from Memphis tickets were sold from Nashville to Atlanta and to intermediate points in the State of Tennessee. On the nights the cars left Nashville for Memphis and Atlanta for Nashville, a car left Memphis for Nashville and another left Nashville for Atlanta, selling tickets from Memphis to Nashville and intermediate points, and no further, and from Atlanta and intermediate points to Nashville and no further. The car from Memphis to Nashville went on the trip to Atlanta before making a return trip to Memphis, and the car making the trip from

Atlanta to Nashville went on the trip the following night to Memphis before making a return trip to Atlanta. The same cars were not used continuously in this service, but were changed from time to time, there being four cars performing the service at all times.

During the year 1887 the East Tennessee, Virginia and Georgia Railroad Company ran two sleepers of its own, doing a business between Knoxville and Chattanooga, Tennessee. During the years 1889, 1890, 1891, 1892 and 1893 the company has operated sleeping cars between Nashville and Memphis and Atlanta and Nashville, as above set forth. From 1887, continuously, the Pullman Company has operated its cars on the lines of the Nashville, Chattanooga and St Louis Railway, the Louisville and Nashville Railroad, East Tennessee, Virginia and Georgia Railroad, now the Southern Railway, the Newport News and Mississipi Valley Railroad, Illinois Central Railroad and Cincinnati Southern Railroad, and all other railroads within the State of Tennessee whereon sleeping cars are used, and has taken up, carried and put down passengers within the State.

In 1887 sleeping cars were operated during a portion of the year between Nashville and Memphis, and did not pass beyond the limits of the State. It was agreed that, without either party waiving any rights, the plaintiff's claim would be abated $1,234.

The gross receipts of the plaintiff per year from lines running into the State of Tennesseee was about five hundred thousand dollars. The gross receipts per year from passengers carried locally in Tennessee was about twenty-five thousand dollars.

The cars actually used on all these lines during each year would number over one hundred.

After making the foregoing statement, Mr. Justice DAY delivered the opinion of the court.

The taxes in controversy were levied under certain revenue laws of the State of Tennessee. Those for the years 1887 and 1888 provided: "That the rate of taxation on the following privileges shall be as follows: Sleeping cars: Each company doing business in the State, on each car per annum, $500." Section eight of the act provided: "That any and all parties, firms or corporations exercising any of the foregoing privileges must pay this tax, as set forth in this act, for the exercise of such privilege, whether they make a business of it or not."

The Tennessee act of 1877, imposing a tax upon the running of sleeping cars, was before this court for consideration in the case of *Pickard* v. *Pullman Co.*, (117 U. S 34.) That act provided: "That the running or using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared to be a privilege, and the companies shall be required to pay to the comptroller by the

first day of July following fifty dollars ($50) for each and every said cars or coaches used or run over said roads; and if the said privilege tax herein assessed be not paid as aforesaid the comptroller shall enforce the payment of the same by distress warrant."

It was held that the tax was a burden upon interstate commerce and void because of the exclusive power of Congress to regulate commerce between the States. Unless the statute now under consideration can be distinguished from the one then construed, the Pickard case is decisive of the present case. Both taxes were imposed under the power granted by the constitution of Tennessee to lay a privilege tax. This power is held by the Supreme Court of the State to give a wide range of legislative discretion. Any occupation, business, employment or the like, affecting the public, may be classed and taxed as a privilege. (*Railroad* v. *Harris*, 99 Tenn. 684.) In the act of 1877 the running and using of sleeping cars on railroads in the State, when the cars are not owned by the railroads upon which they are run, is declared to be a privilege. Under the act of 1887, the tax is specifically imposed upon a privilege. Under the act of 1877, the tax imposed was fifty dollars for each car or coach used or run over the road. Under the act of 1887, each company doing business in the State is required to pay five hundred dollars per annum for the same privilege. The distinction, except in the amount of annual tax exacted, is without substantial difference. Under the earlier act the tax is required for the privilege of running and using sleeping cars on railroads, not owning the cars. In the later act it is exacted for the privilege of doing business in the State. This business consists of running sleeping cars upon railroads not owning the cars and is precisely the privilege to be paid for under the first act, neither more nor less. In neither act is any distinction attempted between local or through cars or carriers of passengers. The railroads upon which the cars are run are lines traversing the State but not confined to its limits. The cars of the Pullman Company run into and beyond the State as well as between points within the State. The act in its terms applies to cars running through the State as well as those whose operation is wholly *intra*-state. It applies to all alike, and requires payment for the privilege of running the cars of the company regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the State. There is no decision of the Supreme Court of Tennessee limiting the act in its operation to *intra*-state traffic. It is true that the comptroller has sought to restrain the operation of the law by imposing the tax for two years upon cars running between Nashville and Memphis and between Nashville and Chattanooga for two years, and fixing one car in each year as the proportion of local business done on interstate cars for two years. But this action does not conclude the State in taxing for other years, and the action taken by

the comptroller does not limit the terms of the law affecting interstate commerce.

In *LeLoup* v. *Mobile*, (127 U. S. 640, 647,) it was sought to recover a penalty imposed upon an agent of the Western Union Telegraph Company for failure to pay an annual license tax as required by an ordinance of Mobile. In the course of the opinion denying the right to exact the license fee, Mr. Justice Bradley said: "But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subject to taxation, without the imposition of a tax which covers the entire operations of the company."

In *Osborne* v. *Florida*, (164 U. S. 650,) a license tax upon express companies was sustained, in view of the decision of the Supreme Court of that State that it affected only business of the company within the State. The statute now under consideration requires payment of the sum exacted for the privilege of doing any business when the principal thing to be done is interstate traffic. We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the legislature in the terms of the act impose upon the entire business of the company. We are of opinion that taxes exacted under the act of 1887 are void as an attempt by the State to impose a burden upon interstate commerce.

Other considerations apply in the construction of the act of 1889, under which, or acts identical in terms, taxes were collected from 1889 to 1893, inclusive. It provides: "Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum: . . . Sleeping car companies (in lieu of all other taxes except *ad valorem* tax) for one or more passengers taken up at one point in this State and delivered at another point in this State, and transported wholly within the State, per annum, $3,000." Its terms apply strictly to business done in the transportation of passengers taken up at one point in the State and transported wholly within the State to another point therein. It is not necessary to review the numerous cases in this court in which attempts by the States to control or regulate interstate commerce have been the subject of consideration. While they show a zealous care to preserve the exclusive right of Congress to regulate interstate traffic, the corresponding right of the State to tax and control the internal business of the State, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness. In the late case of *Osborne* v. *Florida*, *supra*, Mr. Justice Peckham, speaking for the court, said: "It has never been held, however, that when the business of the company, which is wholly

within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate there is no interference with that commerce by the State statute."

Granting that the right exists whereby a State may impose privilege or license fees upon business carried on wholly within the State, it is argued that the tax of three thousand dollars per annum, collected for carrying one or more local passengers on cars operating within the State, is assessed upon traffic which bears such small proportion to the entire business of the company within the State, that it could not have been levied in good faith upon purely local business, and is but a thinly disguised attempt to tax the privilege of interstate traffic. If the payment of this tax was compulsory upon the company before it could do a carrying business within the State, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from *Pullman Co.* v. *Adams*, (189 U. S. 420,) decided at the last term, wherein it was held that the privilege tax imposed by the State of Mississippi, upon each car carrying passengers from one point in the State to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged that under the constitution of Mississippi the Pullman Company was a common carrier, required to carry passengers, and therefore could not be taxed for the privilege of doing that which it was compelled to do; but in view of a decision of the Supreme Court of Mississippi, sustaining the tax, it was assumed that no such objection existed under the State constitution. Speaking upon this subject, Mr. Justice Holmes, delivering the opinion of the court, said: "If the clause of the State constitution referred to were held to impose the obligation supposed and to be valid, we assume, without discussion, that the tax would be invalid. For then it would seem to be true that the State constitution and the statute combined would impose a burden upon commerce between the States analogous to that which was held bad in *Crutcher* v. *Kentucky*, (141 U. S. 47.) On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another in the State, the case is governed by *Osborne* v. *Florida*, (164 U. S. 650.) The company cannot complain of being

taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

There is additional reason for holding that the Pullman Company may transact its business in Tennessee without paying this privilege tax and continue its interstate business, declining local business, thereby escaping the attempt to tax it upon business wholly within the State. The statute of Tennessee, enacted in 1875, provides: "The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is hereby abrogated; and hereafter no keeper of any hotel, or public house, or carrier of passengers for hire, or conductors, drivers or employes of such carrier or keeper, shall be bound or under any obligation to entertain, carry or admit to his house, hotel, carriage, means of transportation or place of amusement, nor shall any right exist in favor of such person so refused admission, but the right of such keepers of hotels and public houses, carriers of passengers and keepers of places of amusement and their employes to control the access and admission or exclusion of persons to or from public houses, means of transportation and places of amusement, shall be as perfect and complete as that of any private person over his private house, carriage or private theatre or places of amusements for his family." (Shannon's Code, § 3046.)

Under this act, no carrier is required to admit any passenger to his car or means of transportation. While the Pullman Company may not be technically a common carrier, still we think it comes within the scope and meaning of this act. A sleeping car is obviously a public means of transportation. Under this act, the carrier is not obliged to afford its privileges to those making application therefor. Mr. Justice Blatchford, speaking of the character of the service afforded by sleeping cars, in *Pickard* v. *Pullman Co.*, (117 U. S. 34,) said: "The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself."

It follows that a tax imposed upon domestic business, under the circumstances shown, cannot be a burden upon interstate commerce in such sense as will invalidate it.

Under the judgment of the court below, the Pullman Company was permitted to recover for license taxes levied under both acts. In so far as it permitted a recovery for taxes under the act of 1889 and identical laws of other years, the judgment should be modified. For that purpose, and for further proceedings in accordance with this opinion, the case is remanded to the Circuit Court.